Supreme Court, U.S.
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In The
Supreme Court of the United States

ROBERT F. CHRISTIAN, II, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where 882 Army officers were forced into early retirement as the result of a Retirement Board that violated their Constitutional and statutory rights to an unbiased proceeding, can the offending agency use the result of a future administrative proceeding to retroactively determine harmless error in the illegal 1992 proceeding?

2. Is mandated racial bias by the Army's 1992 Lieutenant Colonel Selective Early Retirement Board a fundamental procedural error that is not susceptible to a harmless error analysis?

3. Where this Court's precedent indicates it cannot, and Congress prohibits it, can the United States Court of Federal Claims delegate its judicial duty to determine harmless error in the illegal 1992 proceeding to the offending agency?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

ROBERT F. CHRISTIAN, II, an individual, on behalf of himself and a certified class of 881 similarly situated petitioners.

THE UNITED STATES.

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Order, *Christian v. United States*, No. 02-5165 (Fed. Cir. October 3, 2003) (denying pet. for reh'g). Appendix D, 102.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Federal Circuit entered its judgment on July 29, 2003. Appendix A, 1. Petitioners seek review of that judgment on writ of certiorari.

On September 5, 2003, petitioners timely filed a petition for rehearing *en banc* in the Court of Appeals. On October 3, 2003, the Court of Appeals filed an order denying both a petition for rehearing and the petition for rehearing *en banc*. Appendix D, 102. The present petition for writ of certiorari is timely filed under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment V, Due Process Clause. Appendix E, 104.

10 U.S.C. § 613 (oath of members of military selection boards). Appendix E, 104.

10 U.S.C. § 633 (retirement of Lieutenant Colonels for years of service). Appendix E, 104.

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10 U.S.C. § 1558 (agency review of actions of military selection boards). Appendix E, 106.

Pub. L. No. 107-107, § 503(c), enacted December 28, 2001 (exempting the case at bar from 10 U.S.C. § 1558 review). Appendix E, 112.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari is brought by 882 Army Lieutenant Colonels ("LTCs") unconstitutionally selected for mandatory early retirement. The unconstitutionality of their retirement selection proceeding is undisputed on appeal.

In 1992, the Secretary of the Army convened a Selective Early Retirement Board ("Retirement Board") to consider 4508 LTCs for mandatory early retirement. Retirement Board procedures are governed, *inter alia*, by 10 U.S.C. §§ 613 and 638. Generally speaking, a Retirement Board is comprised of senior officers who are supposed to act without prejudice or partiality. 10 U.S.C. § 613 (App. E, 104). Pursuant to the Secretary's instructions, the Board

reviews the records of officers being considered, arrays the officers in an Order of Merit List ("OML"), and then selects a specified number of them for early retirement based on their OML standings. Selected officers must retire within six months thereafter. 10 U.S.C. § 638(b)(1) (App. E, 105).

In this case, the selection process established by the Secretary's Memorandum of Instruction ("MOI") to the Retirement Board consisted of four phases (App. C, 48-51):

Phase I: In Phase I, board members were required to consider, evaluate and score the record of each officer using consideration factors set forth in the MOI. Significantly – and as conceded by the government – in this initial phase the Retirement Board was required to evaluate minority and female officers' records using additional and preferential consideration factors. Thus, the illegal instructions affected the selection process from the very beginning, and Phase I resulted in an initial OML tainted by mandatory racial and gender discrimination.

Phase II: In Phase II, the Retirement Board applied the Secretary's specified retirement number (1352) to the OML, thereby establishing a "cut line" with the higher scoring 3156 officers being tentatively retained and the lower scoring 1352 officers being tentatively selected for early retirement. The MOI mandated a reevaluation/revote of minority officers' records if the Retirement Board failed to retain minority officers at a rate equal to or greater than the average retention rate for all officers. And, finding that it had not met the minority retention goal, the Retirement Board reevaluated and revoted minority officers' records, again using the preferential consideration factors provided only for minority and

female officers. Following the reevaluations and revotes, the Board re-ranked the OML; as a result, additional minority officers were retained. Conversely, the 882 plaintiffs received no such retention goal, preferential consideration factors, reevaluations, or revotes.

Phase III: In Phase III, the Retirement Board determined whether tentatively retired officers were fully qualified to serve as Lieutenant Colonels, and so finding, it proceeded to Phase IV.

Phase IV: In Phase IV, the Retirement Board removed approximately 183 officers from the tentative retirement list to meet MOI-directed retention quotas based on specialty (*e.g.* Special Forces, Military Intelligence). This was done in descending order of ranking on the tainted OML, as adjusted in Phase II. Thus, even if a minority officer was not moved above the retirement "cut-line" in the Phase II racial revotes, any movement up the OML as a result of the racial revote enhanced that minority officer's opportunity for retention in Phase IV's specialty removals from the retirement list.

Ultimately, the 1992 Retirement Board selected 1169 LTCs for mandatory early retirement. App. C, 51. The government later identified 1047 of these officers as white males.

After denial of his 1993 application for administrative relief, LTC (Ret.) Christian brought this action in the Court of Federal Claims in March 1997. The case was certified as an "opt-in" class action (App. C, 100), and 882 eligible LTCs elected to join the lawsuit.

On cross motions for summary judgment, the trial court held that the plaintiffs' retirements were prejudiced

by race-based selection standards that violated the Fifth Amendment (App. E, 104). *Christian v. United States*, 46 Fed. Cl. 793, 814-15 (2000)[1] (App. C, 91, 93). Having found the government liable, the trial court next considered the appropriate remedy for this Constitutional violation.

In the remedies phase of the case, the plaintiffs relied upon the traditional "constructive service" doctrine, which holds that a military officer is deemed to have continued on active service until lawfully retired. The government recognized this doctrine, but proposed that it should convene a "reconstituted" Retirement Board, delete the unconstitutional instructions, and then award "constructive service" remedies only to those officers retained by the new Retirement Board. App. B, 25. The government labeled its proposal a "harmless error" remedy.[2] *Id.* It conceded that it could not introduce existing "harmless error" evidence of the deliberations of the 1992 Retirement Board that had retired the plaintiffs. As stated by the trial court, and uncontested on appeal:

> Tellingly, the government is not offering to produce affidavits or records documenting the journeys of individual personnel files through secret

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[1] The MOI required identical benefits and preferences for female officers, but the trial court found it unnecessary to rule on the unconstitutionality of those instructions in light of its ruling on the racial benefits and preferences. *Christian*, 46 Fed. Cl. at 815 (App. C, 91-93).

[2] Prior to the remedies decision, the Secretary of Defense proposed retroactive legislation which would have provided the "harmless error" remedy the government sought in this case. However, the 106th Congress rejected that proposal. *Christian v. United States*, 49 Fed. Cl. 720, 726 (2001), *rev'd*, 337 F.3d 1338 (Fed. Cir. 2003) (App. B, 38-39).

> SERB [Retirement Board] proceedings held all the way back in 1992; nor can it do so.

Christian v. United States, 49 Fed. Cl. at 725 (App. B, 35). The record thus contains no evidence that any given plaintiff officer would have been retired without the illegal instructions.

The trial court, relying, *inter alia*, on concurring precedent in the Federal Circuit and the District of Columbia Circuit,[3] ruled in plaintiffs' favor in the remedies phase of the case. *Christian* (App. B, 44). Thereafter, the court certified its remedies decision for interlocutory appeal, and the Federal Circuit granted leave to appeal. *Christian v. United States*, 337 F.3d 1338, 1342 (Fed. Cir. 2003) (App. A, 7).

Five months after the trial court's remedies decision, the 107th Congress enacted 10 U.S.C. § 1558. App. E, 106. This legislation essentially provided the government's desired "harmless error" remedy for new Retirement Board challenges, but expressly exempted this case and similar pending cases: *"The amendments made by this section shall not apply with respect to any action commenced in a court of the United States before the date of the enactment of this Act."* Pub. L. No. 107-107, § 503(c)(2), enacted December 28, 2001. App. E, 112.

On July 29, 2003, the Federal Circuit issued an opinion reversing the trial court's remedies decision. *Christian v. United States* (App. A, 1). The Federal Circuit

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[3] Citing to *Doyle v. United States*, 599 F.2d 984 (Ct. Cl.) (*en banc*), *as amended*, 609 F.2d 990 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 982 (1980) and *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979), *as clarified*, 627 F.2d 407 (D.C. Cir. 1980). *Christian*, App. B, 31-32.

found that the case "is a classic instance for applying harmless error." App. A, 11. The Federal Circuit then fashioned a retroactive "harmless error" remedy effectively identical to the legislative proposal rejected by the 106th Congress and without regard for the 107th Congress's express exemption of this case from such a remedy.

The Federal Circuit directed the lower court to remand the case to the Secretary to determine which officers would have been retained and retired notwithstanding the illegal instructions. *Christian,* App. A, 21-23. This determination might be made by the Secretary with or without convening a new Retirement Board. *Id.* Then, "Once the Secretary determines which members of the plaintiff class are entitled to reinstatement and back pay, the case will be returned to the Court of Federal Claims to consider any challenges to the Secretary's decision and to formulate an appropriate judgment." *Id.*

On September 5, 2003, plaintiffs timely filed a petition for rehearing *en banc.* On October 3, 2003, the Federal Circuit denied both a petition for rehearing and the petition for rehearing *en banc.* App. D, 102.

REASONS FOR GRANTING THE PETITION

Prior to the Federal Circuit's decision in this case, it was clear that a military officer separated from service by an illegal proceeding was deemed as a matter of law not to have been legally separated and thus to have continued on active duty. *E.g., Clackum v. United States,* 296 F.2d 226, 229 (Ct. Cl. 1960); *accord United States v. Brown,* 206 U.S. 240 (1907); *Runkle v. United States,* 122 U.S. 543 (1887); *United States v. Perkins,* 116 U.S. 483 (1886). In the case

at bar, the plaintiff officers were forced into early retirement as the result of a proceeding that, without dispute, violated their Constitutional and statutory rights. The Federal Circuit created a new "remedy," however: the trial court now is required to remand the plaintiffs' case to the Army, which will then determine – in a new unspecified administrative process, conducted over a decade later – whether the officers were harmed by the illegal actions of the original proceeding.

The Federal Circuit's holding that harmless error can be determined in a new administrative process conducted by the offending agency distorts the "harmless error" doctrine far beyond any precedent of this Court. Further, the Federal Circuit erred in failing to find that the fundamental procedural error in the retirement process was a structural error that, under precedent of this Court, is not susceptible to a harmless error determination. In this regard, the Federal Circuit opinion also conflicts with precedent of the D.C. Circuit. Finally, the Federal Circuit opinion directs an unauthorized delegation of judicial authority to the Secretary of the Army that is contrary to the express intent of Congress.

1. WHERE 882 ARMY OFFICERS WERE FORCED INTO EARLY RETIREMENT AS THE RESULT OF A RETIREMENT BOARD THAT VIOLATED THEIR CONSTITUTIONAL AND STATUTORY RIGHTS TO AN UNBIASED PROCEEDING, THE OFFENDING AGENCY CANNOT USE THE RESULT OF A FUTURE ADMINISTRATIVE PROCEEDING TO RETROACTIVELY DETERMINE HARMLESS ERROR IN THE ILLEGAL 1992 PROCEEDING.

The first question presented concerns an unprecedented expansion of the boundaries of the "harmless error" affirmative defense. The Federal Circuit delegated the harmless error determination to the agency that committed the error, to be based on the results of a future agency process, and transferred to the plaintiffs the burden of persuasion on the issue of the harmless error defense. The Federal Circuit erroneously premised its holding on *Texas v. Lesage*, 528 U.S. 18 (1999) (*per curiam*).

The plaintiff officers were involuntarily retired from the Army in 1992 in a selective early retirement process that was infected with racial preferences in violation of Constitutional and statutory law (10 U.S.C. § 613 requires that members of a military selection board perform their duties "without prejudice or partiality"). Liability was established and is uncontested on appeal. In the remedies phase of the case, the government sought to have the case remanded to the Army for a "harmless error" ("same decision") determination. Importantly, the government conceded its inability to offer any evidence to the trial court concerning the deliberations of the 1992 Retirement Board. *Christian v. United States*, App. B, 35. Rather, it proposed that harmless error be shown through the results of a "reconstituted" Retirement Board, conducted

without the illegal instructions given to the 1992 Retirement Board. Those officers retired by the new board would not receive a remedy; those retained by the new board would.

The Federal Circuit, finding that "[t]he present case fits comfortably within the [*Texas v.*] *Lesage* [528 U.S. 18 (1999)] standard" for harmless error determination, held that the case must be remanded by the trial court to the Secretary of the Army, who would then determine "which members of the plaintiff class are entitled to reinstatement and back pay." *Christian v. United States*, App. A, 11, 22. Exactly how this determination will be made was left to the "informed discretion" of the Secretary: "We indicate no view on what would be the most appropriate procedure for the Secretary to follow. That is a matter that lies preliminarily within his informed discretion." App. A, 22. In fact, the Federal Circuit *sua sponte* volunteered that the Secretary might reach a conclusion without even convening the new board sought by the government.[4] *Id.* Finally, the burden was placed upon the plaintiffs to challenge the Secretary's harmless error determination:

> Once the Secretary determines which members of the plaintiff class are entitled to reinstatement and back pay, the case will be returned to the Court of Federal Claims to consider any challenges

[4] The Federal Circuit stated, "We do not know whether the Secretary would have sufficient information to be able to make such determination." App. A, 22. How or why the Secretary could possibly conclude that there was "sufficient information" to make such a determination when the government had taken the position that it could not or would not produce any such evidence *to the trial court* was unexplained.

> to the Secretary's decision and to formulate an appropriate judgment.

Id.

Assuming *arguendo* that the illegality of the 1992 Retirement Board is susceptible to a harmless error determination (see discussion *infra*), the Federal Circuit misconstrued and misapplied *Texas v. Lesage*, 528 U.S. 18 (1999). *Lesage*, which involved a challenge to race-based university admissions, reaffirmed that, "The government can avoid liability by proving that it would have made the same decision without the impermissible motive." 528 U.S. at 21. *Lesage*, however, *did not* approve determining harmless error in a challenged proceeding through a new, future proceeding conducted by the defendant. The defendant in *Lesage*, to meet its burden of proof in court, introduced existing evidence of what the actual admissions committee did; there was no suggestion that the defendant could convene a new, "reconstructed" admissions committee to prove what the original committee would have done absent the error, much less that the defendant could simply make a determination that the error was harmless based on some undefined administrative process.

Where a harmless error analysis is appropriate, the court must make that determination based on evidence in the record, and the defendant has the burden of proving its "same decision" defense. *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977) ("[T]he District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision. . . . "). By contrast, the Federal Circuit has now created a procedure whereby the guilty defendant, not the court, determines

harmless error in a new, future proceeding – in which the plaintiffs have no participation – and the burden is placed on the plaintiffs to challenge the defendant's self-determination of its harmless error defense. *Christian*, App. A, 22.

There are also practical flaws with the Federal Circuit's holding. The holding relies on the statistical probability that even if the 1992 Retirement Board had been legally conducted, many of the plaintiffs would have been separated from service. *Christian*, App. A, 11. But, there is no existing *evidence* upon which a harmless error determination can be made as to any given plaintiff, *Christian v. United States*, App. B, 35, and obviously, none in the record. Nor will the "harmless error" procedure embraced by the Federal Circuit render any reliable or authentic evidence that any individual plaintiff would have been retired by the original Retirement Board notwithstanding the illegal instructions. The military selection process is "highly subjective," *Doyle v. United States,* 599 F.2d 984, 998 (Ct. Cl.) (*en banc*), *as amended*, 609 F.2d 990 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 982 (1980), and there is no basis in the record – or as a matter of law or logic – to hold that a "harmless error" determination over a decade later by a new board (or by a successor Secretary) in any way proves what the original board would have done.

That the Federal Circuit's so-called harmless error procedure is chimerical is illustrated by the fact that under the court's approach there is no meaningful way for an aggrieved officer – on whom the burden of proof is now placed – to show in his "challenge" that the "reconstituted board" or Secretary is wrong, and that he *would* have been retained by the original board. As previously noted, the record on appeal shows that the government was unable to

produce any evidence of the original Retirement Board's deliberations. *Christian,* App. B, 35. Even the infected Order of Merit List from the 1992 proceeding does not exist to compare an officer's ranking by the illegal process and the new process. *Christian*, App. A, 21. ("At oral argument, the government stated that the 'order of merit' list for the officers the Retirement Board considered no longer existed and that it was uncertain whether the officers' ranking could be determined from other data."). Thus, the plaintiff officer originally ranked immediately above the "cut line" (and thus certainly displaced by movement of minority officers above the cut line) could, as a result of the new process, be told he would have been retired anyhow without any evidentiary basis to challenge the Secretary's determination. In short, there is no way for any plaintiff – or any court – to test the results of the Federal Circuit's new procedure. Ultimately, the indisputably illegal conduct of the original board will be deemed harmless for any given plaintiff merely because the Army says so, and neither the court nor the Army can give any assurance that any plaintiff officer's career was not abruptly destroyed in 1992 as the result of illegal bias.

In *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), this Court held:

> Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict.". . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to

> support that verdict might be – would violate the jury-trial guarantee. (emphasis original)

Likewise, if a harmless error review is warranted here, it must look to the basis on which the 1992 Retirement Board actually rested its decisions – *a basis which the government admits no longer exists*. Hypothesizing what the 1992 board "actually" did based on the results of a future proceeding conducted by different decision-makers is a "fictitious recasting of past conduct," *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 320 n. 54 (1978), and it violates the plaintiff officers' Constitutional and statutory guarantee to an unbiased 1992 Retirement Board.

2. MANDATED RACIAL BIAS BY THE ARMY'S 1992 LIEUTENANT COLONEL SELECTIVE EARLY RETIREMENT BOARD IS A FUNDAMENTAL PROCEDURAL ERROR THAT IS NOT SUSCEPTIBLE TO A HARMLESS ERROR ANALYSIS.

As discussed *infra*, the Federal Circuit's holding that mandated illegal racial bias by the Army's retirement board is susceptible to harmless error analysis conflicts with the United States Court of Appeals for the District of Columbia Circuit in *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979), *as clarified*, 627 F.2d 407 (D.C. Cir. 1980). The Federal Circuit's holding also is inconsistent with holdings of this Court.

The "harmless error" jurisprudence of this Court in the context of jury trials distinguishes between "structural errors" and "trial errors." "Structural errors," such as a biased judge or jury, render a procedure "fundamentally unfair" and defy a harmless error analysis:

> Despite the strong interests that support the harmless-error doctrine, the Court in *Chapman* [*v. California*, 386 U.S. 18 (1967)] recognized that some constitutional errors require reversal without regard to the evidence in the particular case. . . . This limitation recognizes that some errors necessarily render a trial fundamentally unfair.

Rose v. Clark, 478 U.S. 570, 578 (1986). Structural errors are distinguished from "trial errors," such as the admission of improper evidence, which are subject to a harmless error analysis. *E.g., Sullivan v. Louisiana*, 508 U.S. 275 (1993); *Arizona v. Fulminante*, 499 U.S. 279 (1991).

Texas v. Lesage, 528 U.S. 18 (1999), permitted a harmless error analysis in a case alleging racial bias in a university admissions process. A military Retirement Board, however, is not analogous to a university admissions committee; rather, a military selection board is analogous to a jury. *Doyle v. United States,* 599 F.2d 984, 995 (Ct. Cl.) (*en banc*), *as amended*, 609 F.2d 990 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 982 (1980) (finding the *Chapman v. California* line of cases "more analogous" where issue is "procedural errors in the decision-making process of a selection board"). Like a jury, a military selection board is established by law, and its members are by statute sworn to act "without prejudice or partiality." 10 U.S.C. § 613. Also like a jury, a military selection board receives instructions, and functions in secrecy. *Doyle v. United States*, 599 F.2d at 998 (board engaged in "highly subjective and secret decision-making"); *Sanders v. United States*, 594 F.2d 804, 815 (Ct. Cl. 1979) (*en banc*) ("Selection board proceedings are secret and the records of those proceedings are routinely and promptly destroyed. . . . ").

Federal Circuit and District of Columbia Circuit precedent hold that structural errors in military selection board procedures are not susceptible to a harmless error analysis. Thus, it was held in *Doyle*, 599 F.2d at 995-98, that a harmless error defense was unavailable as a matter of law where there had been a statutory failure to include Reserve officers on a military selection board. *Accord Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979), *as clarified*, 627 F.2d 407 (D.C. Cir. 1980).

In the case at bar, the Federal Circuit attempted to distinguish *Doyle* on the basis that the error in that case involved a defect in the "composition" of the board, whereas the error here involved illegal mandatory instructions to the board. *Christian*, App. A, 15. The Federal Circuit's premise that only an error in board composition is "structural" is fallacious. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court held that a constitutionally deficient reasonable doubt instruction to a jury was one that "vitiates all the jury's findings" (*id.* at 281), and therefore is not susceptible to a harmless error analysis. Likewise, it has repeatedly been held that bias of a judge is never harmless. *E.g.*, *Sullivan*, 508 U.S. at 279; *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

The Selective Early Retirement Board procedure was created by Congress to be a fair process to retire military officers who otherwise are entitled to serve for a period of years established by statute.[5] The heart of the Congressional mandate is that the board be comprised of members

[5] Lieutenant Colonels are ordinarily entitled to serve for 28 years. 10 U.S.C. § 633 (App. E, 104-05).

who will act "without prejudice or partiality." 10 U.S.C. § 613 (App. E, 104). Requiring members of a Retirement Board to act *with* prejudice and partiality clearly is a structural error (indeed, it is a "compositional error" in the worst sense, since members are instructed to violate their oath). The illogic and error of the Federal Circuit opinion are further shown by the fact that in this circuit there is now precedent that statutory failure to include Reserve officers on a military selection board is a fundamental error *not* susceptible to a harmless error analysis because it *might* have resulted in prejudice (*Doyle*), but, under the holding in the case at bar, issuing *mandatory* instructions to board members that they must discriminate against Reserve officers in violation of both statute and the Constitution *would be* subject to a harmless error analysis.

The jurisprudence of this Court teaches that whether a harmless error analysis is appropriate depends on the nature of the error and whether a court can meaningfully consider its effect. *Sullivan v. Louisiana*, *supra*. The nature of the error here (racial bias in violation of the Fifth Amendment and 10 U.S.C. § 613) and the nature of the proceeding (a military retirement board making subjective judgments in a secret process), means that the error is one of those that defies harmless error analysis. Racial prejudice infected the entire Retirement Board process from Phase I through Phase IV; all of the retirement selections were tainted, and there is no reliable way to determine the effect of the error. The plaintiffs' deprivation of their Constitutional and statutory rights to a retirement process without prejudice or partiality, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural

error'," *Sullivan,* 508 U.S. at 282, and there can therefore be no harmless error review.

The Federal Circuit's opinion has, as apparently recognized in the opinion itself, created a conflict in the circuits. *Christian*, App. A, 16-17. In *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979), *as clarified*, 627 F.2d 407 (D.C. Cir. 1980), Reserve officers challenged their involuntary separation from service. The D.C. Circuit held that since the military board at issue did not include Reservists, as required by statute, the officers had been illegally retired. The *Dilley* court rejected the Army's argument that the results of subsequent boards that considered the officers demonstrated the lack of prejudice by the illegal board, holding that Congress imposed "nondiscriminatory institutional safeguards" to protect Reservists, and, "The Army is not free to disregard this legislative decision and to opt instead to determine on an *ad hoc* basis whether or not such bias exists." *Dilley*, 603 F.2d at 923. As conceded by the Federal Circuit in the case at bar, "Although the [*Dilley*] court did not use the phrase "harmless error" in discussing the issue, that was the concept it considered and rejected." *Christian*, App. A, 16. The Federal Circuit, recognizing the conflict, simply found that *Dilley*, being precedent of the D.C. Circuit, "does not bind this court," and, "we do not consider *Dilley* a persuasive precedent for the present case." App. A, 16-17.

3. WHERE THIS COURT'S PRECEDENT INDICATES IT CANNOT, AND CONGRESS PROHIBITS IT, THE UNITED STATES COURT OF FEDERAL CLAIMS CANNOT DELEGATE ITS JUDICIAL DUTY TO DETERMINE HARMLESS ERROR IN THE ILLEGAL 1992 PROCEEDING TO THE OFFENDING AGENCY.

Assuming *arguendo* that the case at bar is susceptible to a harmless error analysis, there is no authority that would permit the Court of Federal Claims to delegate that judicial duty to the Army, and, correspondingly, no authority vested in the Army to make that determination.

A. The Court of Federal Claims Cannot Delegate Its Judicial Duty To Determine Harmless Error In The Case At Bar.

There is nothing in this Court's harmless error jurisprudence that supports the Federal Circuit's delegation of adjudicatory authority. Indeed, this Court's precedent makes it clear that a harmless error analysis is a *judicial* determination based on evidence of what occurred in the proceeding under consideration. *See Sullivan v. Louisiana, supra; Harrington v. California*, 395 U.S. 250, 254 (1969) ("Our judgment must be based on our reading of the record. . . . "); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 320 n. 54 (1978) (where no "record revealing that legitimate alternative grounds for the decision existed. . . . a remand would result in fictitious recasting of past conduct.").

Nor is the delegation supported by the Tucker Act (28 U.S.C. § 1491), which governs the jurisdiction of the Court of Federal Claims. The Tucker Act is triggered by the "money-mandating" statutory right of military officers to

their pay until properly discharged from service. "37 U.S.C. § 204 confers on an officer the right to the pay of the rank he was appointed to up until the time he is properly separated from the service. . . . If the discharge was wrongful the statutory right to pay continues; this right serves as the basis for Tucker Act jurisdiction." *Holley v. United States,* 124 F.3d 1462, 1465 (Fed. Cir. 1997) (internal punctuation omitted), *quoting Sanders v. United States,* 594 F.2d 804 (Ct. Cl. 1979) (*en banc*). The Court of Federal Claims does not review the merits of a military personnel decision (such as whether to promote an officer); rather, the court determines whether the procedure was lawfully conducted:

> This court has consistently recognized that, although the *merits* of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy.

Adkins v. United States, 68 F.3d 1317, 1323 (Fed. Cir. 1995) (emphasis original).

The role of the court in military personnel matters is thus to decide whether the service-member was lawfully separated from service. Historically, a service-member wrongfully separated from service is deemed to have remained in service for the purpose of entitlement to pay and emoluments of office (the "constructive service" doctrine). *E.g., Dilley v. Alexander*, 627 F.2d 407, 411 (D.C. Cir. 1980) (noting that *Smith's Case*, 2 Ct. Cl. 206 (1866) "marks the historical cornerstone for this doctrine, and it has been followed to the present."). Precedent of this Court is in accord. *E.g., United States v. Perkins*, 116 U.S. 483, 485 (1886). This right to pay and other benefits of office is

the basis for jurisdiction under the Tucker Act. *E.g., Tippett v. United States,* 185 F.3d 1250, 1255 (Fed. Cir. 1999) ("If [an officer's] discharge was involuntary and improper, his statutory right to pay was not extinguished and thus serves as a basis for Tucker Act jurisdiction."). [6]

The Federal Circuit cited no authority for its direction that the case be remanded to the Army, and the Tucker Act does not authorize this type of remand. In 1972, the Tucker Act was amended to permit a remand of "appropriate matters": "In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." Pub. L. No. 92-415; 28 U.S.C. § 1491(a)(2). The case at bar is not such an "appropriate matter."

As shown above, a harmless error determination, where appropriate, is a judicial function. Indeed, delegating determination of this affirmative defense from open court to the unilateral determination of the offending agency raises glaring due process concerns: in contrast to the judicial proceedings ordinarily available to plaintiffs under the Tucker Act, the procedure created by the Federal Circuit is an amorphous process conducted by the agency whose decision is under review, in which plaintiffs will have no opportunity to participate.

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[6] Although Tucker Act jurisdiction is predicated on a monetary claim, the Court of Federal Claims can afford an "entire remedy," which may include an order "directing restoration of office or position, placement in appropriate duty or retirement status, and correction of applicable records," 28 U.S.C. § 1491(a)(2).

The statutory history of the 1972 amendment to the Tucker Act shows that it was intended to apply to contract cases where because of statutory and contractual constraints the Court of Federal Claims could *not* receive evidence. S. Rep. 92-1066 (1972 U.S.C.C.A.N. 3116, 3118-19); *see United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966) and *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963) (cited in S. Rep. 92-1066).[7] Here, however, the Court of Federal Claims was not prohibited from considering evidence on the issue of harmless error, if any had been proffered: "Ordinarily, when questions of fact arise in [suits brought under the Tucker Act], the function of the court is to receive evidence and to make appropriate findings as to the facts in dispute." *United States v. Carlo Bianchi & Co.*, 373 U.S. at 713. There is thus no authority to remand the case at bar to the agency. "[T]his provision [28 U.S.C. § 1491(a)(2)] does not give the Court of Federal Claims unlimited authority to require subordinate bodies to conduct investigations and find facts." *Richey v. United States*, 322 F.3d 1317, 1323 (Fed. Cir. 2003).

It is axiomatic that a court vested with jurisdiction must exercise that jurisdiction (except in limited cases of abstention or where Congress alters jurisdiction). *E.g.*, *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 497 (1971) ("[I]t is a time-honored maxim of Anglo-American common-law tradition that a court possessed of jurisdiction

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[7] The Senate Report cites "suits arising under the 'dispute' clause of Government contracts" as the genesis for the remand authority. Under Supreme Court authority, the restrictions *of the dispute clause* (required in government contracts) meant that the Court of Claims (later, the Court of Federal Claims) could not remand, even when the record was incomplete. 1972 U.S.C.C.A.N. 3116, 3118-19.

generally must exercise it."), *citing Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). Being vested with jurisdiction pursuant to the Tucker Act, the Court of Federal Claims had the authority and duty to decide this case[8], and the Federal Circuit had no authority to cede jurisdiction of a harmless error determination to the agency.

B. The Offending Agency Is Not Authorized To Determine Harmless Error In The Case At Bar.

In the courts below (both trial and appellate), the government advocated a remand of the case to the Army for a "reconstituted board" that would re-do the 1992 Retirement Board without the illegal instructions and thereby determine which plaintiffs were harmed. *Christian v. United States*, App. A, 21 ("The government urges, as it did in the Court of Federal Claims, that if we accept its argument on harmless error, the case should be remanded for the Secretary to appoint a new Retirement Board, which would evaluate anew the officers the Retirement Board considered in 1992 and, without the impermissible instructions, make new recommendations for retention and release."). The Federal Circuit ruled that the case should be remanded for this purpose, but *sua*

[8] As stated by the trial court in the case at bar: "[C]onstitutional adjudications are the duty of the courts . . . and that includes the remedial as well as the liability determinations." *Christian*, at App. B, 38.

sponte permitted the Secretary, "within his informed discretion," to determine harmless error without appointing a new Retirement Board. App. A, 21-22. There is no authority, however, for the Secretary or a "reconstituted board" to make a harmless error determination.

The "reconstituted board" remedy is contrary to federal statute. The Selective Early Retirement Board is a statutory creation, and 10 U.S.C. § 638(b)(1) does not permit a Retirement Board to retire officers retroactively. App. E, 105. Recognizing this difficulty, the Federal Circuit attempted to avoid it by holding that a "reconstituted board" would not be making retirements retroactively; its results would be used "solely to determine the individuals with respect to whom the error was harmless." *Christian*, App. A, 15. But there is likewise no authority, and the Federal Circuit cites none, for a Retirement Board to be a reviewing body or "evidentiary proceeding" as to the actions of another, earlier Retirement Board. Indeed, the Federal Circuit's own precedent seemed to deny such a possibility:

> [W]e reject defendant's contention that the reconstituted boards were merely an evidentiary proceeding into the question of whether the error was prejudicial and that the results of the new procedure demonstrates the harmlessness of the error as to the plaintiffs. * * * * It is wrong to conclude that a completely new process, which renders a new decision with important consequences, is an evidentiary hearing into the question of prejudice. . . .

Doyle v. United States, 599 F.2d 984, 996 (Cl. Ct.) (*en banc*), *as modified*, 609 F.2d 990 (Cl. Ct. 1979), *cert. denied*, 446 U.S. 982 (1980). And, obviously, if there is no

authority for a Retirement Board to function as an "evidentiary proceeding," to determine harmless error in past proceedings of another such board, then *a fortori* there is no authority for the Secretary to act in that capacity.

There is also no statutory or inherent authority vested in the Secretary of the Army to determine whether a given plaintiff officer would have been retired if the 1992 Retirement Board had been legally conducted. Indeed, granting such authority to the Secretary circumvents the careful statutory selective early retirement scheme enacted by Congress. If a Retirement Board is the only means to prematurely retire an officer otherwise in good standing (which it is), and if a Retirement Board must operate lawfully (which it must), there certainly can be no authority vested in the Secretary to instruct a Retirement Board to act unlawfully and then decide that an officer retired by that board was legally retired.

Nor is there overriding legislation that would authorize the administrative remedies procedure created by the Federal Circuit's opinion. In fact, the opinion's remedies procedure is contrary to the express Congressional exemption afforded this case and similar pending cases. Congress has in recent years enacted administrative remedies where military selection boards have been challenged. *See* 10 U.S.C. § 628 (promotion board); *Porter v. United States*, 163 F.3d 1304 (Fed. Cir. 1998) (same). These statutes alter prior law and modify the jurisdiction of the courts in applicable cases. In 2001, Congress enacted 10 U.S.C. § 1558 (App. E, 106) which created a retroactive agency review procedure for future Retirement Board cases, and limited any judicial review. *See* 10 U.S.C. § 1558(d) and (f) (App. E, 109-10). But the case at bar and similar pending cases were expressly *exempted* from the new procedure:

The amendments made by this section shall not apply with respect to any action commenced in a court of the United States before the date of the enactment of this Act. Pub. L. No. 107-107, § 503(c)(2) (App. E, 112). While the agency review procedure created by the Federal Circuit for this case is less defined, there is no meaningful distinction between it and the agency review procedure first authorized in 10 U.S.C. § 1558 and expressly *not* to be applied to the case at bar. Thus, in its effect, the Federal Circuit's agency review procedure impermissibly nullifies the Congressional exemption.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant Writ of Certiorari and reverse the judgment of the Court of Appeals for the Federal Circuit.

Dated: December 26, 2003.

Respectfully submitted,

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APPENDIX A

337 F.3d 1338

United States Court of Appeals,
Federal Circuit.

Robert F. CHRISTIAN, II, et al., Plaintiffs-Appellees,
v.
UNITED STATES, Defendant-Appellant.

No. 02-5165.

July 29, 2003.
Rehearing En Banc Denied Oct. 3, 2003.

John K. Larkins, Jr., Chilivis, Cochran, Larkins & Bever LLP, of Atlanta, Georgia, argued for plaintiffs-appellees.

Robert M. Loeb, Attorney, Appellate Staff, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Robert D. McCallum, Jr., Associate Attorney General; and Marleigh Dover, Attorney.

Barry P. Steinberg, Kutak Rock, of Washington, DC, for amici curiae Ronald Alvin, et al., and Michael Christensen, et. al. Of counsel on the brief was William A. Aileo, Attorney at Law, of Springville, Pennsylvania.

Before LINN, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and PROST, Circuit Judge.

FRIEDMAN, Senior Circuit Judge.

The Court of Federal Claims held that the proceedings by which an Army Board recommended the involuntary retirement of certain Army officers were constitutionally invalid because of instructions by the Secretary of the Army that the Board give minority and female officers

preferential treatment. The court further held that the harmless error concept was inapplicable in this case. The result of the latter ruling was that many non-retained white male officers who would not have been retained even if the Board had not given preferential treatment to minority and female officers, nevertheless would be reinstated as of the date of their involuntary retirement and receive back pay to that date. The government here challenges only the court's harmless error ruling. We reverse that ruling.

I

A. The facts forming the background of this suit, as found by the Court of Federal Claims, *Christian v. United States,* 46 Fed. Cl. 793, 798-99 (2000), and as supplemented by the record, are undisputed.

In 1992, the Secretary of the Army ("Secretary") convened a Selective Early Retirement Board ("Retirement Board"), pursuant to 10 U.S.C. §§ 611, 638, to recommend Army lieutenant colonels for involuntary early retirement. The Secretary issued lengthy detailed instructions to the Board, which was told to select for early retirement a "minimum" of 1210 officers and an "optimum" of 1452. (The Board reported that it recommended 1169 officers for early retirement.) "[B]ased on the guidance" in the instructions, the Retirement Board was directed to "determine which officers to recommend for selective early retirement by first determining an order of merit list of the officers considered."

One section of the instructions, captioned "*Minority and Female Officers,*" included the following provisions:

a. The Army is firmly committed to providing equal opportunity for minority and female officers in all facets of their career development, utilization, and progression. The goal for this board is to achieve a percent of minority and female officers recommended for early retirement not greater than the rate for all officers in the zone of consideration. This goal is important because, to the extent that each board achieves it, the Army at large will have a clear perception of equal opportunity and the officers not recommended for early retirement will enjoy the opportunity for continued career progression to the benefit of the Army. This goal is not intended as guidance for you to meet any "quota."

b. In evaluating the records of minority and female officers, the board should consider that past personal and institutional discrimination may have disadvantaged minority and female officers. Such discrimination may include, but certainly is not limited to, disproportionately lower evaluation reports, assignments of lesser importance or responsibility, and lack of opportunity to attend career-building military schools. Take these factors into consideration in evaluating these officers' potential to make continued significant contributions to the Army.

c. Prior to recess, the board (in the report of officers recommended for early retirement) must review and report the extent to which minority and female officers were recommended at a rate greater than males and non-minority officers.

The instructions specified four "phases of deliberation" through which the Retirement Board should proceed. For phase two, in which it was to "Evaluate minority and

female goal attainment," the following directive was included:

> (2) If there are adverse deviations in the minority or female selection rates overall or within a specific career field, the board will reevaluate and may revote the files of the minority and female officers keeping in mind the factors contained in paragraph 4 of Enclosure 1. After revoting an officer's record, the relative standing will be adjusted.

The Retirement Board's proceedings for early retirement involved 4522 lieutenant colonels. In making its recommendations, the Retirement Board followed the four-phase procedure, only the first two steps of which are relevant here.

In phase one, the Retirement Board reviewed and evaluated the officers' records and based thereon established the comprehensive "order of merit," as directed by the Secretary's instructions. In phase two, the Retirement Board determined the "optimum number" of officers to be recommended for early retirement and then applied that number to determine the dividing line on the "order of merit" list between those to be retained and those to be retired.

At the conclusion of the phase two determinations, the percentage of minority officers to be retired was greater than the overall retirement rate for all officers. The Retirement Board then reevaluated the records of the minority officers, and selected a number of them for retention. It recommended 1052 white male lieutenant colonels for early retirement, with 3067 retained; and 131 minority and female officers for early retirement, with 341

retained. (There may be some overlap within these categories.)

In its "After-Action Report," the Retirement Board stated that in its initial determinations in phase one:

> The Board did not meet its minority selection goal. Minority officers were selected for early retirement at a rate of 29 percent in comparison to the overall selection rate of 25.8 percent. Upon completion of the Board's initial deliberations, it reevaluated minority officer files. The Board identified some minority officers whose records warranted reconsideration to ensure they had not been disadvantaged by past personal or institutional bias. A revote was conducted resulting in a number of minority officers being selected for retention on active duty.

B. The appellee Christian, a white lieutenant colonel who was involuntarily retired as a result of the Retirement Board's proceedings, filed in the Court of Federal Claims a class action complaint, seeking retroactive reinstatement and back pay. Count IV of his first amended complaint alleged that, "by imposing unlawful gender and racially classified retention goals . . . and selection consideration factors, and unlawful, gender and racially classified remedies for the possible disadvantages of societal discrimination," the Secretary and the Retirement Board "violated plaintiff's constitutional right to equal protection guaranteed under the Due Process Clause of the Fifth Amendment of the United States Constitution."

In its first opinion, the Court of Federal Claims granted summary judgment for Christian on his constitutional due process claim in Count IV. *Christian,* 46 Fed. Cl. at 815. The court held that the Secretary's instruction to

the Retirement Board "created a race and gender-based goal and that it required consideration of different factors in evaluating minority and female officers than when evaluating white male officers," and that it therefore was subject to "strict scrutiny," "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id.* at 803 (citation omitted). The court concluded that the instructions did not meet those requirements, and that the "Army's affirmative action program for the 1992 [Retirement Board] . . . violates the Due Process Clause of the Fifth Amendment." *Id.* at 814.

The court also certified as the class for the action "the male nonminority officers selected by the [Retirement Board] for retirement." *Id.* at 816-17.

After further proceedings, the court issued a second opinion dealing with the remedy. *Christian v. United States,* 49 Fed. Cl. 720 (2001). It ruled that all members of the class were entitled to reinstatement as of the date of their initial illegal discharge and back pay and other remedies from that date to the date of their proper discharge. *Id.* at 722, 728. The court rejected the government's proposed "harmless error" analysis, under which the government proposed to establish a new selection board to determine which retired officers were harmed by the instructions, i.e., who would have been retained had the instructions not been given. *Id.* at 721. Instead, the court applied the "constructive service" doctrine, under which members of the military who have been improperly discharged are treated as having continued to serve until they are properly discharged; they are therefore entitled to back pay and allowances for that period of constructive service. *Id.* at 721-22. *See, e.g., Tippett v. United States,* 185 F.3d 1250, 1255 (Fed.Cir.1999). The court held that

Christian's retirement was both "involuntary" and "also legally improper, because the revote and the evaluation criteria in the [instructions] violated the equal protection component of the Fifth Amendment's Due Process Clause." 49 Fed. Cl. at 722.

The court certified the case for interlocutory appeal under 28 U.S.C. § 1292(d)(2) and this court authorized the government's appeal.

II

A. The doctrine of "harmless error" is a well-established settled principle of federal law. In the recent case of *Texas v. Lesage,* 528 U.S. 18, 120 S.Ct. 467, 145 L.Ed.2d 347 (1999), Lesage contended that the University of Texas, in denying him admission to a Ph.D. program, used a race-conscious admissions program in violation of the Equal Protection Clause of the Fourteenth Amendment. In seeking summary judgment, Texas "offer[ed] evidence that, even if the school's admissions process had been completely colorblind, Lesage would not have been admitted." *Id.* at 19, 120 S.Ct. 467. The district court granted summary judgment for Texas on this issue, but the Fifth Circuit reversed, viewing the question as "'whether the state violated Lesage's constitutional rights by rejecting his application in the course of operating a racially discriminatory admissions program.'" *Id.* at 20, 120 S.Ct. 467 (quoting *Lesage v. Texas,* 158 F.3d 213, 222 (5th Cir.1998)). The Supreme Court summarily reversed. It stated:

> Insofar as the Court of Appeals held that summary judgment was inappropriate on Lesage's § 1983 action seeking damages for the school's

> rejection of his application for the 1996-1997 academic year even if petitioners conclusively established that Lesage would have been rejected under a race-neutral policy, its decision is inconsistent with this Court's well-established framework for analyzing such claims. Under *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration. Our previous decisions on this point have typically involved alleged retaliation for protected First Amendment activity rather than racial discrimination, but that distinction is immaterial. The underlying principle is the same: The government can avoid liability by proving that it would have made the same decision without the impermissible motive.
>
> Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983. . . . But where there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability.

Id. at 20-21, 120 S.Ct. 467 (citations omitted).

Mt. Healthy involved a non-tenured schoolteacher who challenged the school board's refusal to rehire him. 429 U.S. at 274, 97 S.Ct. 568. He contended that the Board's

decision was based on his exercise of free speech rights protected by the First and Fourteenth Amendments. *Id.* The Board contended that apart from the constitutionally protected activity, it would not have rehired him in any event. *Id.* at 285, 97 S.Ct. 568. The district court rejected the latter contention, and the court of appeals affirmed. *Id.* at 276, 97 S.Ct. 568. The Supreme Court vacated the court of appeals judgment and remanded. It stated:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" – or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Id. at 287, 97 S.Ct. 568 (footnote omitted).

As these cases indicate, the Supreme Court has recognized that a harmless error analysis is appropriate even for constitutional claims. "[T]he Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Arizona v. Fulminante,* 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (citations omitted).

Indeed, the harmless error principle has been given statutory recognition in 28 U.S.C. § 2111 (2000), which provides:

> § 2111. Harmless error
>
> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

It also has been recognized in Rule 61 of the Federal Rules of Civil Procedure, and in Rule 52(a) of the Federal Rules of Criminal Procedure.

This court and its predecessor court have applied the harmless error analysis to military back pay cases. *See Lindsay v. United States,* 295 F.3d 1252, 1261 (Fed.Cir.2002); *Sanders v. United States,* 219 Ct.Cl. 285, 594 F.2d 804 (1979); *Skinner v. United States,* 219 Ct.Cl. 322, 594 F.2d 824 (1979). "To recover back pay, it is not enough for the plaintiff to show merely that an error or injustice was committed in the administrative process; he must go further and either make a showing that the defect substantially affected the decision to separate him or relieve him from active duty, or at least he must set forth enough material to impel the court to direct a further inquiry into the nexus between the error or injustice and the adverse action." *Hary v. United States,* 223 Ct.Cl. 10, 618 F.2d 704, 707 (1980). If this burden is met, the "end-burden of persuasion falls to the Government to show harmlessness – that, despite the plaintiff's prima facie case, there was no substantial nexus or connection." *Engels v. United States,* 230 Ct.Cl. 465, 678 F.2d 173, 175 (Ct.Cl.1982). But see the discussion in Part II D, below.

Under this authority, an officer cannot prevail in a challenge to a discharge after non-promotion if the government can demonstrate that, notwithstanding the error

in the promotion proceedings, the officer still would not have been promoted. "[T]he quintessential military promotion question" is "whether it is unlikely that he . . . would have been promoted in any event." *Porter v. United States,* 163 F.3d 1304, 1318 (Fed.Cir.1998) (citation and internal quotation marks omitted).

The present case is a classic instance for applying harmless error. The constitutional claim is that the white officers who were retired as a result of the Retirement Board proceedings were denied equal protection because of the instructions to the Board to give minority and female officers preferential treatment. The total number of minority and female officers retained was 341. Even if one were to assume that every one of those officers was retained solely because of an impermissible preference accorded minorities and females – a most unlikely assumption – at most that would mean that 341 white officers who were retired should have been retained.

The total number of white officers actually retired, however, who comprise the plaintiff class, was more than 1000. Thus, even under the most extreme assumption only about one-third of the white officers should have been retained. The Court of Federal Claims, however, would treat the entire group as having been improperly retired and give all of them reinstatement and back pay.

The present case fits comfortably within the *Lesage* standard. In *Lesage* the Court stated that "even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." 528 U.S. at 20-21, 120 S.Ct. 467 (citation omitted).

In the present case the government has demonstrated with respect to at least two-thirds of the involuntarily retired male officers that it would have retired that number even without the impermissible instruction that favored minority and female officers.

"The general rule is that damages for breach of contract shall place the wronged party in as good a position as it would have been in, had the breaching party fully performed its obligation." *Mass. Bay Transp. Auth. v. United States,* 129 F.3d 1226, 1232 (Fed.Cir.1997) (citations omitted). "A corollary of that principle is that the non-breaching party is 'not entitled to be put in a better position by the recovery than if the [other party] had fully performed the contract.'" *White v. Delta Constr. Int'l, Inc.,* 285 F.3d 1040, 1043 (Fed.Cir.2002) (citation omitted). Applying those general rules of damages to the back pay claims in the present case, the applicable principle is that the retired white officers are entitled to be placed in the same position they would have been in if the Retirement Board had not considered the impermissible factors of race and gender in determining whom to recommend for involuntary early retirement, but not in a better position. *Cf. Mt. Healthy,* 429 U.S. at 285-86, 97 S.Ct. 568 ("[E]ven if the same decision would have been reached had the incident not occurred[,][t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.").

The latter result, however, would follow from the Court of Federal Claims' denial of harmless error for two-thirds of the retired white officers. Although there is no theory upon which those officers would have been retained had there not been the inappropriate instruction to the

Board, the effect of the court's decision is to treat them as if they had been all retained instead of retired. The harmless error doctrine is designed to prevent just such a result. We know of no reason, convincing or otherwise – and the Court of Federal Claims has not provided any – why this group of retired officers should receive such a substantial financial windfall representing back pay they could not and would not have received even if the Retirement Board proceedings had been wholly free from the taint the Court of Federal Claims found in them.

The amici contend that the government waived its harmless error claim by not asserting it sooner, and that the harmless error doctrine applies only to liability questions but not to damages issues. Since none of the parties has made or adopted either argument, we decline to consider them. *In re Alappat,* 33 F.3d 1526, 1536 (Fed.Cir.1994) (citing *United Parcel Serv., Inc. v. Mitchell,* 451 U.S. 56 n. 2, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981) ("[A]micus may not rely on new arguments not presented below.")).

B. The Court of Federal Claims held, however, that "the relevant precedent in this case" is not *Lesage,* but the en banc Court of Claims decision in *Doyle v. United States,* 220 Ct.Cl. 285, 599 F.2d 984, *as amended,* 220 Ct.Cl. 326, 609 F.2d 990 (1979), *cert. denied,* 446 U.S. 982, 100 S.Ct. 2961, 64 L.Ed.2d 837 (1980). *Christian,* 49 Fed. Cl. at 724. Decisions of our predecessor courts are binding precedent in this court. *South Corp. v. United States,* 690 F.2d 1368, 1370 (Fed.Cir.1982).

In *Doyle,* former Army Reserve officers challenged their release from active duty after they had been passed over twice for promotion by selection boards in 1974 and

1975. 599 F.2d at 988. At the time a statute required that Boards considering the promotion of reserve officers "'sh[ould] include an appropriate number of Reserves.'" *Id.* at 986 (citing 10 U.S.C. § 266(a) (1976)). Those selection boards had no reserve members.

When the error was discovered, the Secretary created new boards that had reserve members, and the reconstituted boards reconsidered all officers whom the original boards had considered. *Id.* at 991. "Although the reconstituted boards recommended promotion of some officers who were not selected by the original boards, none of the plaintiffs was among those recommended for promotion by either of the boards reconstituted for 1974 or 1975." *Id.* at 992.

The government conceded, and the Court of Claims held, that "the original 1974 and 1975 selection boards were improperly constituted because they did not include any Reserve officers as members." *Id.* The government contended, however, that since all the plaintiffs had again been passed over for promotion by the reconstituted selection boards which contained reserve officers, the lack of such officers on the original selection boards was harmless error because, even if those original boards had contained reserve members, they still would not have promoted the plaintiffs. *Id.*

The Court of Claims refused to apply the doctrine of harmless error. Noting that the "defective composition" of the original selection boards, *id.* at 993, was "directly related to the purpose and functioning of selection boards," *id.* at 994, and violated the reserve officers' "rights to fair procedure or process," the court concluded that "the

doctrine of harmless error cannot be applied to this type of procedural error." *Id.* at. 996.

Doyle differs from the present case in two significant respects.

First, the "type of procedural error" in *Doyle* was the improper composition of the original Boards, whose membership violated a statutory requirement. The lack of reserve officers on those Boards deprived the plaintiffs of their statutory right to consideration by a tribunal containing officers of the same status they had. In the present case, on the other hand, the Retirement Board was properly constituted. The defect in the Board proceedings was the impermissible instructions given to the Board regarding preferential treatment of minority and female officers.

Second, in *Doyle* the result of the proceedings before the reconstituted boards was the basis upon which the government rested its claim of harmless error. In the present case, however, the government's harmless error claim rests upon the results of the original Board's proceedings. The government proposed to use the reconstituted board solely to determine the individuals with respect to whom the error was harmless.

Christian contends, however, that the government's proposed use of new retirement boards as a basis for applying the harmless error doctrine to the retired officers would involve an impermissible retroactive retirement of those officers whom the board would select, and that *Doyle* ruled that such action was improper. As just noted, however, the new retirement boards would be used for a different purpose in this case than the purpose for which they were used in *Doyle*. Indeed, it seems ironic that retired officers who will be reinstated and given back pay

should complain that such action by the new retirement board would be improper.

Particularly in light of the Supreme Court's recent strong reaffirmation of the harmless error doctrine in *Lesage,* we decline to extend the Court of Claims' theory for rejecting harmless error in *Doyle* to the significantly different present case.

The Court of Federal Claims also relied on the decision of the District of Columbia Circuit in *Dilley v. Alexander,* 603 F.2d 914 (D.C.Cir.1979), *clarified by,* 627 F.2d 407 (D.C.Cir.1980). That was another case in which former Reserve officers challenged their release from active duty after they had been twice been [sic] passed over for promotion by Boards that did not have Reserve members. 603 F.2d at 916. The District of Columbia Circuit, like the Court of Claims in *Doyle,* held that the absence of Reserve members on the Board was a fatal flaw in the administrative proceedings. *Id.*

As in *Doyle,* the Army contended that the subsequent passovers by new promotion boards that had Reserve members "demonstrate that the defect in the composition of the 1975 Boards did not result in any *prejudice* to appellants." *Id.* at 921. The court rejected that argument because "the *prejudice* which the statute guaranteed against, insofar as reserve officers were concerned, was consideration by a promotion board devoid of reserve officers." *Id.* Although the court did not use the phrase "harmless error" in discussing the issue, that was the concept it considered and rejected.

The decision of the District of Columbia Circuit in *Dilley* does not bind this court. For the reasons given in

our discussion of *Doyle,* we do not consider *Dilley* a persuasive precedent for the present case.

C. The Court of Federal Claims also invoked the constructive service doctrine as a ground for rejecting the harmless error claim in this case. Under that doctrine, military personnel who have been illegally or improperly separated from service are deemed to have continued in active service until their legal separation. *Clackum v. United States,* 148 Ct.Cl. 404, 296 F.2d 226, 229 (1961). They are, therefore, entitled to back pay and benefits for the intervening period, i.e., retroactive to their original separation from service. *Egan v. United States,* 141 Ct.Cl. 1, 158 F.Supp. 377, 386 (1958). *Hary,* 618 F.2d at 707. As the District of Columbia Circuit stated in its clarifying opinion in *Dilley,* the constructive service doctrine is a "legal fiction": "as appellants have never been lawfully terminated from active duty, they are deemed to have served during the time of their illegal release." 627 F.2d at 413. To recover back pay under the doctrine, the former service person must have been improperly separated from the service and there must be a "nexus between the error . . . and the adverse action." *Hary,* 618 F.2d at 707.

Nothing in the constructive service doctrine is inconsistent with applying harmless error in this case. The constructive service doctrine was designed to permit the award of back pay to a service person who had been injured by the improper termination of his service, and thereby denied the financial and other benefits he should and would have received but for the improper termination. In the present case, the retired white officers who would have been retired even if the impermissible instruction had not been given to the Retirement Board cannot be properly viewed as having had their military service

improperly terminated, and they therefore have not been injured. There is, accordingly, no occasion to invoke the constructive service doctrine for them, since they have no claim, legal or equitable, to back pay for any period during which they did not perform military duty. Indeed, as we have noted above, both this court and the Court of Claims have applied the harmless error principle in military back pay cases.

D. The year after the *Doyle* decision, there was a significant "change in law governing the review of twice passed-over officers." *Porter v. United States,* 163 F.3d 1304, 1323 (Fed.Cir.1998). The Defense Officer Personnel Management Act in 1980 included what is now 10 U.S.C. § 628 (2000), which authorizes the Secretary of the military service involved to appoint a special selection board "to make promotion or passover decisions when original selection boards had passed over an officer in circumstances in which the officer's record before the original boards contained faulty OERs [officer effectiveness reports]." *Porter,* 163 F.3d at 1313. In *Porter,* this court considered the effect of section 628 upon the harmless error doctrine in cases in which military officers who had been discharged as a result of being twice passed over for promotion by promotion boards challenged those passovers as based upon service records that contained serious errors. *Id.* at 1321-24. This court ruled:

> The harmless error test, while necessary to adjudicate cases such as this before the enactment of section 628, is not only unnecessary now, but grafting it onto section 628 is sufficiently problematic for us to reject that possibility. In cases

> such as this, the harmless error rule has no application.

Id. at 1324.

In our subsequent decision in *Richey v. United States,* 322 F.3d 1317 (Fed.Cir.2003), we explained that

> In *Porter* we held that once it is determined that the initial selection board's decision "involved material administrative error," nothing in this statute requires the Secretary, acting through the Corrections Board, to make a harmless error determination. Instead, under the statute, as interpreted in *Porter,* the Corrections Board should refer the matter to an SSB [special selection board], which decides whether to promote the officer based on his corrected military record, and, therefore, "the harmless error rule has no application."

Id. at 1324 (citing *Porter,* 163 F.3d at 1323).

In the context before the court, the statement in *Porter* that the harmless error rule is inapplicable "[i]n cases such as this" refers to cases that section 628 covers, i.e., those in which an officer twice passed over for promotion by a promotion board challenged his ensuing discharge as based on alleged errors in his service records before that board. *Porter* concluded that prior decisions of the Court of Claims and this court that had applied harmless error in that situation had been overruled "because of the change in law" made by section 628, namely, the Secretary's authority to refer such a case to a special selection board to decide whether the officer should be promoted. 163 F.3d at 1323-24.

Neither *Porter* nor *Richey* is inconsistent with our application of harmless error in the present case. This case involves officers released from active duty pursuant to the recommendation of a retirement board, whose task was to reduce the total number of officers of the same rank on active duty. It does not involve officers discharged as a result of having been twice passed over for promotion. At the time this case was decided, section 628 covered only the latter type of case, but not the former. (In 2001 Congress enacted 10 U.S.C.A. § 1558 (1998 & Supp.2003), which provided for retirement boards a similar procedure to that section 628 provides for promotion boards. As the government recognizes, however, that new provision does not apply to the present case.)

Indeed, the administrative inquiry in those cases was significantly different from the inquiry in the present case. In the passover discharge cases, there were two questions: (1) was the officer's service record (on which the promotion board based its decision) incorrect and, if so, (2) would the officer have been promoted on a proper record. *Porter* and *Richey* ruled that since section 628 substituted for the second inquiry a re-evaluation of the officer by a special selection board on the basis of a proper service record, there was no need or occasion for a harmless error analysis.

In the present case, however, two propositions are already established: (1) the original retirement board proceedings were tainted by the improper instructions and (2) under no circumstances could approximately two-thirds of the white officers who were retired have been retained if there had not been the improper instructions. Although a harmless error inquiry was neither necessary nor appropriate in the passover discharge cases because of section

628, without such an analysis in the present case approximately two-thirds of the white retired officers would receive a substantial financial windfall to which they have no valid claim.

III

The government urges, as it did in the Court of Federal Claims, that if we accept its argument on harmless error, the case should be remanded for the Secretary to appoint a new Retirement Board, which would evaluate anew the officers the Retirement Board considered in 1992 and, without the impermissible instructions, make new recommendations for retention and release. The Secretary then would determine which white male officers who were released should and would have been retained. We agree that the case should be remanded, but we think the Secretary should be able to follow an alternative procedure if he deems it appropriate.

At oral argument, the government stated that the "order of merit" list for the officers the Retirement Board considered no longer existed and that it was uncertain whether the officers' ranking could be determined from other data. We do not know whether the available information would permit the Secretary, without appointing a new retirement board, to determine which of the retired officers would have been retired even had there been no impermissible instructions to the Retirement Board regarding minority and female officers. What is clear, however, is that (1) at most, approximately one-third of the plaintiffs would be entitled to recover, because that equals the maximum total number of minority and female officers retained, and (2) since the additional minority

officers retained in phase 2 were so treated to eliminate the disparity between the non-retention rate for minority officers and that for all officers, without the impermissible instructions no additional white male officers would have been retained in lieu of those additional minority officers kept on duty.

The Secretary might conclude that instead of appointing a new retirement board that would reevaluate all the officers involved, he can determine, and therefore should designate for reinstatement and back pay, those retired white male officers who, had there not been the impermissible instruction, would have been retained. We do not know whether the Secretary would have sufficient information to be able to make such determination.

We indicate no view on what would be the most appropriate procedure for the Secretary to follow. That is a matter that lies preliminarily within his informed discretion. Our discussion of this point was merely intended to suggest to the Secretary a possible alternative approach for determining which members of the plaintiff class are entitled to relief. Of course, the Secretary may conclude that the available information does not enable him to make such determination and that a new retirement board is necessary.

Once the Secretary determines which members of the plaintiff class are entitled to reinstatement and back pay, the case will be returned to the Court of Federal Claims to consider any challenges to the Secretary's decision and to formulate an appropriate judgment.

CONCLUSION

The decision and order of the Court of Federal Claims is reversed insofar as it refused to apply harmless error in this case, and the case is remanded to that court with instructions to remand the case to the Secretary for further proceedings consistent with this opinion.

REVERSED IN PART AND REMANDED.

APPENDIX B

49 Fed.Cl. 720

United States Court of Federal Claims.

Robert F. CHRISTIAN, II, Plaintiff,

v.

The UNITED STATES, Defendant.

No. 97-165C.

July 10, 2001.

John K. Larkins, Jr., Law Offices of Chilivis, Cochran, Larkins & Bever, LLP, Atlanta, GA, for plaintiff. *W. Carl Lietz, III, Nickolas P. Chilivis*, and *J.D. Dalbey*, Law Offices of Chilivis, Cochran, Larkins & Bever, LLP, Atlanta, GA, of counsel.

Armando O. Bonilla, with whom were *James M. Kinsella*, Deputy Director, David M. Cohen, Director, Commercial Litigation Branch, and David W. Ogden, Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, D.C., for defendant. Lt. Col. Jill Grant, Chief, Military Personnel Litigation, Army Litigation Division, U.S. Department of the Army, Arlington, VA, of counsel.

OPINION

SMITH, Senior Judge.

I. INTRODUCTION

In the June 5, 2000 Opinion, *Christian v. United States*, 46 Fed.Cl. 793 (2000) (hereinafter Liability Opinion), this court ruled that the Memorandum of Instruction (MOI) issued by the Secretary of the Army to the 1992

Army Competitive Category Lieutenant Colonel Selective Early Retirement Board (SERB) unconstitutionally discriminated on the basis of race, creating race-based evaluation criteria and revote procedures. That opinion presents the pertinent facts, which do not require wholesale repetition. The court certified the class of nonminority males[1] "as to liability" and "require[d] further proceedings on the question of remedies, especially in light of class certification on liability," *id.* at 817.

A status conference was held on September 11, 2000 and highlighted the parties' diametrically opposite views on which remedies are appropriate. Plaintiff stated its position that the appropriate remedy is court-ordered active duty back pay and corresponding non-monetary remedies, such as "constructive service" remedies authorized under the Military Pay Act, 37 U.S.C. § 204, the military records correction statute, 10 U.S.C. § 1552, and the Tucker Act, 28 U.S.C. § 1491(a)(2). The government, however, requested that, pursuant to RCFC 60.1(a)(i) and (ii), and 28 U.S.C. § 1491(a)(2), the entire case be remanded to the Secretary for reconsideration by a reconstituted SERB. Describing the remand as a "harmless error" process, the government alleged that "[i]f the Court were to award all the relief requested by Plaintiff's counsel, regardless of merit, well over 1,000 people would receive an unjust windfall at the expense of both the taxpayers and military morale." Tr. of Status Conference at 18. The court ordered a round of briefing on remedies and an additional oral argument. Plaintiff also filed a Motion to

[1] For remedies purposes, plaintiff seeks to include survivors into the class. The request is granted as stated below.

Require Immediate Preparation of List of Potential Class Members, Retrieval of Personnel Files, and Tagging of Financial Files (Motion to Compel), which defendant asked the court to reject for mootness. At oral argument, the court from the bench DENIED defendant's request for remand and GRANTED plaintiff's request for remedies. Subsequently, plaintiff's counsel submitted for the court's approval a Draft Agreement regarding attorney fees, a consulting fee for LTC Christian, and expenses. This Opinion contains full explanations of the court's ruling on remedies, the Motion to Compel, and the Draft Agreement.

The United States and its military officers have a special relationship. No other profession asks so much of a man or a woman undertaking it. At the same time, there is no other profession on which the very existence of this country and its ideals depend so much. General Douglas MacArthur gave this definition of the Army officers' calling:

> Duty – Honor – Country. Those three hallowed words reverently dictate what you ought to be, what you can be, what you will be. . . . [T]hrough all this welter of change and development [in politics, economics, and technology], your mission remains fixed, determined, inviolable – it is to win our wars. Everything else in your professional career is but corollary to this vital dedication. All other public purposes, all other public projects, all other public needs, great or small, will find others for their accomplishment; but you are the ones who are trained to fight: yours is the profession of arms – the will to win, the sure knowledge that in war there is no substitute for victory; that if you lose, the nation will be destroyed; that the very obsession of your public service must be Duty – Honor – Country. . . . [S]erene, calm, aloof, you stand as the nation's war-guardian, as its lifeguard from the raging tides of

> international conflict, as its gladiator in the arena of battle. For a century and a half you have defended, guarded, and protected the hallowed traditions of liberty and freedom, of right and justice. . . .
>
> You are the leaven which binds together the entire fabric of our national system of defense. From your ranks come the great captains who hold the nation's destiny in their hands the moment the war tocsin sounds. [You] never failed us. Were you to do so, a million ghosts in olive drab, in brown khaki, in blue and gray, would rise from their white crosses thundering those magic words – Duty – Honor – Country.

Address by General of the Army Douglas MacArthur to the Members of the Association of Graduates, U.S.M.A., The Corps of Cadets, and Distinguished Guests upon His Acceptance of The Sylvanus Thayer Award, United States Military Academy, West Point, New York, at 1, 5-6. (May 12, 1962) (on file with the U.S.M.A. Public Affairs Office).

When individuals accept officer commissions and assume so sacred a trust, this nation in turn fulfills its part by offering these officers pay and benefits for the duration of their service. The nation also promises, through its Constitution, that its officers who defend liberty abroad will enjoy equal rights and liberties at home. The appropriate remedy for improper retirement because of racial discrimination must honor both of these commitments. It must be consistent with the "unique characteristics and commitment of military service" and "with the Court's historic jurisdiction." Tr. of Oral Argument at 48.

To be sure, the government's "harmless error" proposal addresses important considerations: Secretarial powers over defense policy and protection of the public

treasury's integrity. Yet the government's position must yield to the judgement of Congress, acknowledged by the courts, that constructive service remedies are necessary. The details of allowed remedies, however, are a matter for further proceedings in this case.

II. CONSTRUCTIVE SERVICE DOCTRINE

The "constructive service" doctrine is one of the most venerable in this court, originating with *Smith's Case,* 2 Ct.Cl. 206, 1800 WL 464 (1866). The plaintiff, an assistant quartermaster in the Army, was dismissed by an order of the Secretary of War. President Abraham Lincoln subsequently revoked the dismissal order on appeal. The Army, however, refused pay for the time between dismissal and reinstatement. The government took the position that "[i]t may be the misfortune of this claimant to have fallen under unjust censure, requiring his removal from office, but the power to appoint includes the power to remove all military officers." *Id.* at 208. The court found that constructive service pay was required:

> When the order of dismissal was revoked, it was revoked from its inception, and altogether, because from its nature, it was indivisible and could not operate for a term . . . for though an officer may be suspended from his duty, he cannot be suspended from his office . . . [and] the reason for revoking [a dismissal] goes to the whole, and not to the part of it, and such is to be taken as the purpose of the revocation.
>
> If the dismissal was revoked from its inception, all the consequences were annulled, and the petitioner . . . [is] entitled to the pay and emoluments fixed by

> the law for that rank [which he had at the time of the dismissal].

Id. at 209.

As *Smith's Case* illustrates, the constructive service pay remedy exists because of the nature of the relationship between members of the Armed Services and the United States: a relationship based on commissions or term offices. The commission system assures the service members of their status until they are properly discharged. This status necessarily involves the emoluments of office.

The doctrine continues to be recognized in cases under the Military Pay Act, 37 U.S.C. § 204, the money-mandating statute in this case. "Section 204 provides that 'a member of the uniformed service who is on active duty' is 'entitled to the basic pay of the pay grade to which assigned.' An officer's right to pay under Section 204 continues until the officer is *properly* separated from the service . . . If [his] discharge was involuntary and improper, his statutory right to pay was not extinguished." *Tippett v. United States,* 185 F.3d 1250, 1255 (Fed.Cir. 1999) (emphasis added). In fact, even though the government rejects the constructive service doctrine out of an avowed desire "to possibly avoid liability in whole or in part," Def. Br. at 10, the court noted in the Liability Opinion that "[i]f his discharge was involuntary and improper, [plaintiff's] right to pay under 37 U.S.C. § 204(a)(1) was not extinguished." *Christian,* 46 Fed.Cl. at 799 (citing *West v. United States,* 35 Fed.Cl. 226 (1996)). The Liability Opinion also alluded to the doctrine in

declining to resolve "whether the [Phase II] revote procedure actually displaced members of the class who would otherwise have been retained." *Christian* at 802.

Retirement by the SERB is involuntary. *See Adkins v. United States,* 68 F.3d 1317, 1321-22 (Fed.Cir.1995) (interpreting the SERB's organic statute, 10 U.S.C. § 638). In this case, retirement of plaintiff Christian was also legally improper, because the revote and the evaluation criteria in the MOI violated the equal protection component of the Fifth Amendment's Due Process Clause.

Nonetheless, the parties disagree whether plaintiffs suffered the type of harm for which the constructive service remedy is appropriate. Defendant defines harm as "an opportunity to compete for retention in an environment free from unlawful discrimination." Def. Br. at 13 (citing *Campbell v. TVA,* 613 F.Supp. 611 (E.D.Tenn.1985) (rejecting an Age Discrimination in Employment Act claim)). Plaintiff contends that the procedurally flawed and improper retirement itself was sufficiently harmful. For support, he chiefly relies on *Doyle v. United States,* 220 Ct.Cl. 285, 306, 599 F.2d 984, *as amended,* 220 Ct.Cl. 326, 609 F.2d 990 (1979), *cert. denied,* 446 U.S. 982, 100 S.Ct. 2961, 64 L.Ed.2d 837 (1980), which held that unlawfully separated plaintiffs "were entitled to their position, rank, and pay until they were terminated from active duty under proper authority." Plaintiff also invokes persuasive authority, *Dilley v. Alexander,* 627 F.2d 407, 411 (D.C.Cir.1980), *as clarified,* 627 F.2d 407 (D.C.Cir.1980) (plaintiff is "entitled to receive the benefits of constructive active duty from the date of his erroneous release until the day he is restored to active duty.")

Defendant argues that *Doyle, Dilley,* and their progeny are distinguishable and do not support the application of the constructive service doctrine here. Those cases involved passovers of officers by improperly constituted promotion boards, and the distinction lies in supposed judicial rulings "that illegally composed selection boards were *per se* harmful and, consequently, all promotion nonselections and resulting separations were void *ab intitio* [sic]." Def. Br. at 17. But the composition of the boards is not the harm on which the *Doyle* line relief holdings turned. Rather, the harm was the loss of careers due to erroneous discharge:

> We must remember that appellants are career officers; deprivation of their livelihood was not a momentary insult that ended the instant they were thrown out on the streets. Rather, appellants faced the loss of their careers, and with it the loss of attendant benefits they would have earned and received during this period following the termination of their service as officers.

Dilley, 627 F.2d at 411.

Doyle, a case brought by commissioned Army Reserve officers challenging their discharge that resulted from promotion passovers by selection boards without any Reserve members as required by statutory procedure, rejected a similar "harmless error" proposal, and indicated that "[p]roper analysis . . . involves the effect the error had on . . . actual pay consequences." 220 Ct.Cl. 285, 305, 599 F.2d 984. In *Doyle,* as here, the government invoked *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), for the proposition that a nexus is lacking between the violation and the decision to

release plaintiff from service. *See* 220 Ct.Cl. at 301, 599 F.2d 984.

In *Doyle,* the Court of Claims first found that "some errors are so inimical to judicial or fair process that their violation cannot be tolerated under any circumstances . . . [and a]pplication of the test of harmful error would result in the dilution of the afforded protection." *Id.* at 302, 599 F.2d 984. Because, unlike *Mt. Healthy,* "the error in . . . [*Doyle* was] a violation of the plaintiffs' rights to fair procedure or process, . . . Congress' purpose would be thwarted unless the Secretary is aware that this is a . . . requirement that cannot be waived." *Id.* at 303, 599 F.2d 984. Where "the procedural violation penetrates to the heart of the process . . . deemed necessary for fair judgement in selecting officers, . . . [it] is presumed prejudicial in accordance with the policy" of the law. *Id.* Although this case concerns procedural protections of the Constitution, the policy considerations are, at the least, no weaker than in *Doyle.*

This rationale illustrates the weakness of the government's other argument in favor of remand, that is, deference to Secretarial authority over Army personnel management. Since the whole purpose of constitutional government is to circumscribe the authority of government officials, allowing the Secretary to unconstitutionally retire the officers because he could prove later that some of them should be retired anyway would in practice destroy the constitutional restraint.

Hypothetically, the Secretary may decide to effect a reduction in personnel by a certain percentage of the total force to satisfy national security priorities – a permissible

and laudable objective. The Secretary, however, is prohibited by the Constitution from discharging all Catholics because they approximate the percentage of the force slated for reduction. Should the Secretary do so, a remand for a reconstituted board would amount to a grant of authority to temporarily cut off careers and endanger the livelihoods of all the Catholics in the Army. The government argues that the Secretary would presumably never act in such an arbitrary and capricious manner, and the court firmly believes no Secretary in our government would so act. However, constitutions are not primarily made to restrain those who do good. Our Framers understood that all of us have the capacity to violate people's rights, whether with good or evil intent. In fact, here the Secretary employed an improper racially discriminatory scheme. It is not this court's function to determine the intent, but rather to protect the rights of those whose rights were taken. One could only fathom the damage to the morale of officers were this court to tell them that the best remedy they can get is a limited legal procedure.

Doyle's second reason for rejection of the "harmless error" approach was the impossibility "for a reviewing body to determine what effect the error had on the judgment of the original proceeding . . . [since r]ecommendations . . . are the product of subjective, secret evaluations of officers by officers." 220 Ct.Cl. at 303, 599 F.2d 984. Personnel evaluations in the military operate on a whole-man concept. It cannot be reduced to a mere list of credentials requirements which is the typical approach in civilian employment or educational admissions. Not surprisingly, *Doyle* held that remand to a reconstituted board would actually "delve into the selection boards' exercise of discretion" because "[i]n no way can the proper influence of

Reserve officers be injected into the original process, after the fact, in order to determine the effect it might have had on the judgment of the board." *Id.* Since the same approach to evaluation is used by the SERBs, deference to the military's expertise on qualifications of officers and practical impossibility to measurably modify the evaluation compels the same result here.

Moreover, the difficulties in fashioning a harmless error remedy in the whole-man evaluation context are only compounded by the fluid standards created by the racial classification here, such as less-important assignments or lower evaluations of minorities. As this court found, "these standards . . . do not eliminate instances in which an assignment of lesser importance came from non-discriminatory sources (including personal wishes of the officer), or instances in which the lower evaluation report came from simple poor officer performance . . . [and] leaves these factors open to broad discretion." *Christian,* 46 Fed.Cl. at 813-14. Thus, the government's remand proposal "does not demonstrate that the error was harmless nor render the original error harmless as to those officers passed over by the new procedure." *Doyle* 220 Ct.Cl. 285, 599 F.2d 984, 996.

The government seeks to cast doubt on *Doyle's* continued validity in light of a recent decision in *Texas v. Lesage,* 528 U.S. 18, 19, 120 S.Ct. 467, 145 L.Ed.2d 347 (1999), reaffirming *Mt. Healthy.* ("Our previous decisions on this point have typically involved alleged retaliation for protected First Amendment activity rather than racial discrimination, but that distinction is immaterial. The underlying principle is the same: the government can avoid liability by proving that it would have made the same decision without the impermissible motive."). In

Lesage, the Supreme Court held that plaintiff did not allege a "congizable injury under [42 U.S.C.] § 1983" in a suit over denial of his application to a Ph.D. program through race-conscious review by the admissions committee. Defendant, however, was able to present conclusive affidavit and data evidence showing that his application was eliminated from consideration early in the process, and that all other applicants admitted possessed superior, quantifiable credentials such as Graduate Record Examination (GRE) scores and grade point averages (GPAs). On these facts, the Court found no injury "where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the decision regardless." 528 U.S. at 21, 120 S.Ct. 467.

However, on closer examination of *Lesage, Doyle* remains the relevant precedent in this case. First, the whole-man evaluations challenged in *Doyle* and here cannot be reduced to discrete components in the same way that graduate admissions process can be reduced, at least in a significant part, to rating of applicants by GRE and GPA numbers. Due to the nature of the SERB proceedings and the classification itself, which encouraged SERB member discretion, isolating the effect of the discriminatory Phase I and II standards as well as Phase II procedures is impossible. Second, the "harmless error" rule of *Lesage* concerned proof of facts as they were at the time of the alleged violation and injury, not creation of new procedures and analysis of new outcomes. Tellingly, the government is not offering to produce affidavits or records documenting the journeys of individual personnel files through secret SERB proceedings held all the way back in 1992; nor can it do so. The reconstituted board procedure

cannot produce any, much less conclusive evidence of the 1992 SERB's decision-making. Thus, even the arguably more concrete Phase II revote procedure defies post-hoc evidentiary inquiry. Third, *Lesage* did not even mention the line of Supreme Court precedent cited in *Doyle* concerning fundamental procedural violations. *See Doyle,* 220 Ct.Cl. at 302, 599 F.2d 984 (citing *Harrington v. California,* 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Whitus v. Georgia,* 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967)). Therefore, *Lesage* in no way repudiates the teaching of *Doyle* that fundamental procedural errors are inherently prejudicial.

The government contends that its proposal is "consistent with governing law." Tr. of Status Conference at 17. Yet its primary supporting authority resides in certain amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.,* and the statutory provisions creating Special Selection Boards for promotions, 10 U.S.C. § 628. The Title VII amendments specifically allow an employer defendant to establish that it would have reached the same personnel decision through reconstituting the decision-making process. *See* 42 U.S.C. § 2000e-5(g)(2)(B), 5(g)(2)(b)(ii) (1991). However, these amendments are not even arguably applicable to, much less governing, officer retirements. *See Hodge v. Dalton,* 107 F.3d 705, 708 (9th Cir.1997) ("Title VII is inapplicable to uniformed members of the military."). The ADEA is likewise inapplicable to the military. *See Canonica v. United States,* 41 Fed.Cl. 516, 523 (1998).

The provision which created a Special Selection Board (SSB) for officers passed over for promotions, of course, by

its own terms does not extend to decisions of SERBs. *See* 10 U.S.C. § 628 (directing the Secretary to convene a special selection board to remedy a non-consideration by a "promotion board" due to an "administrative error."). Moreover, the organic SERB legislation, 10 U.S.C. § 638 was enacted as a part of the same Defense Officer Personnel Management Act of 1980 (DOPMA), Pub.L. No. 96-513, 94 Stat. 2835 (Dec. 12, 1980), as section 628. Since "[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent," Sutherland Stat. Const. § 46:05, it is safe to assume that the best interest of national security is served by both the SSB and the constructive service approaches to remedies embodied in the law. Applying the relook board approach in section 638 cases would twist legislative intent rather than effectuate it. Far from being persuasive in the government's favor, congressional decision to limit the operation of SSBs to promotion boards counsels against the government's position.

A recent Federal Circuit decision regarding promotion SSBs, *Porter v. United States,* 163 F.3d 1304 (Fed.Cir. 1998), in fact reaffirms the *Doyle* approach to remedying certain violations even where Congress made the SSBs available. *Porter* pointed out that the purpose behind SSBs is to leave the disputes on the merits of promotability, essentially questions of military judgement, to the fellow officer members of selection boards. Civilian review bodies, such as Boards of Correction of Military Records, do not automatically void prior passovers in such cases. *Porter,* recognized that under *Doyle* before section 628, in "[i]nstances of fundamental error . . . where there is no doubt that the error undermines the outcome," reinstatement and back pay awards by civilian bodies followed

automatically. 163 F.3d at 1319. In dicta, the court mentioned that even post-DOPMA "[m]atters such as impermissible considerations of race, sex or religion, or instances of an illegally composed selection board (one thus incapable of producing a legal result) . . . [may be readily adjudicated by civilians] without judging the competing qualities of specific military experience records." *Id.* at 1321. A civilian tribunal such as this is just as capable to recognize the obvious harm and grant the remedy here, where no special military expertise is required. As we noted in the Liability Opinion, constitutional adjudications are the duty of the courts, *see Christian,* 46 Fed.Cl. at 802, and that includes the remedial as well as the liability determinations.

Moreover, Congress specifically rejected a relook board amendment to the SERB scheme in the Floyd D. Spence National Defense Authorization Act for FY 2001. *Compare* H.R. 4205, 106th Cong. §§ 551-53 (2d Sess.2000) (introduced in the House), *with* H.R. 4205, 106th Cong. (2d Sess.2000) (reported by the House) (provisions eliminated), *and* S. 2549, 106th Cong. § 506 (2d Sess.2000) (placed on calendar of the Senate), *with* H. Conf. Rep. 106-945, at 799 (2000) ("The conferees believe that, while such an approach may have merit, this issue requires further study."). "Generally, the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment." Sutherland Stat. Const. § 48:18. However, the United States appears to urge an end-run on the Congressional decision. Further, plaintiffs submitted to the court a copy of the July 6, 2000 Letter from Douglas A. Dworkin, General Counsel, U.S. Department of Defense, to William G. Paul, President, and Robert J. Grey, Jr.,

Chairman of the House of Delegates, American Bar Association, regarding the proposed reconstituted boards amendment which stated that "[u]nder current law in the Federal Circuit and the D.C. Circuit, if a court identifies an error in a selection board that applies to the board as a whole (e.g. . . . instructions to the board), the court may provide full relief, including reinstatement, back pay, and increased retirement benefits to all service members who were not selected by the defective board." Letter at 1-2 (citing *Doyle,* 220 Ct.Cl. 285, 599 F.2d 984 (1979), and *Dilley v. Alexander,* 603 F.2d 914 (D.C.Cir.1979)). Defendant's counsel strenuously argued that Congress did not really reject the amendment because it is taking the steps to hold hearings on the subject. Tr. of Oral Argument at 13. But legislative deliberations are all the more a reason to apply the law as it is, not as a party would like it to be.

The defendant's position is inconsistent with the nature of relief historically available in this court. The reconstituted SERB the government offers is essentially non-monetary relief. Plaintiff had every apparent right to pursue an injunction assuring equal opportunity to compete in a U.S. district court. But in the U.S. Court of Federal Claims, the remedy is primarily monetary, and entitlement to it turns on the operation of a money-mandating statute. The fact that the statute was triggered by a Due Process violation in no way diminishes the rights that statute confers. Should the Army succeed in persuading the Congress and the President, the SERB statute may, of course, provide in the future for reconstituted relook boards. Until this happens, this court cannot, nor do we have the authority to, force plaintiff to choose which relief he should seek. *Cf. Cooley v. United States,* 46 Fed.Cl. 538 (2000) (plaintiff cannot be forced to pursue

APA review of agency decision restricting land use and forego a taking claim).

III. REMEDIES ISSUES

"Judicial relief provided to military servicemen who have been wrongfully discharged from service has been premised upon one central principle: making the injured men 'whole.' Courts attempt to return successful plaintiffs to the position they would have occupied 'but for' their illegal release from duty." *Dilley,* 627 F.2d at 413. On behalf of the class of all nonminority males and their survivors[2], plaintiff is seeking a variety of status and payment remedies.[3] Government counsel did not specifically challenge the substance of each remedy, except objecting to any potential recovery of attorneys fees above and beyond the total sum of other monetary remedies to be awarded.

Plaintiff proposed a thorough, complex, and rather lengthy scheme to administer the remedies. First, the

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[2] Inclusion of survivors is obviously necessary to enable full recovery even though they were not included in the liability class. The same applies to other lawfully authorized recipients, such as representatives of incapacitated liability class members. *See* RCFC 23 (administering class actions is at the discretion of the court).

[3] While plaintiff characterized some remedies, such as correction of records, as non-monetary, the jurisdictional basis for awarding these remedies is a money-mandating statute. *See Christian,* 46 Fed.Cl. at 799 (citing *French v. United States,* 42 Fed.Cl. 49, 53 (1998)). Also, for purposes of the Judgment Fund statute, 31 U.S.C. § 1304, back pay judgments do not have to specify the dollar amount. *See* GAO Office of General Counsel, Principles of Federal Appropriations Law, Vol. III, Ch. 14, at 16 (2d ed.1994) (citing opinions of the Comptroller General).

proposal sets in place a process of notification of putative class members, opting them into the class, and collecting data on individual claims. This initial process could have lasted over 200 days. Subsequent to the opting-in, the government would be directed to perform status remedies such as correction of records, consideration for missed promotion and other opportunities, and reinstatement. For some eligible class members, status remedies could take over a year from the opt-in date to be completed. Finally, the proposal called for the government to commence certain payments to class members within sixty days of the opt-in date, while requiring further calculations and payments upon processing of individual claim proofs. This remedial scheme is agreeable to the court in principle.

While plaintiff demonstrated his entitlement to the proposed remedies, the court nevertheless reserves their implementation on a class-wide basis at this time. Instead, the court finds that a more limited notification procedure and an opportunity to seek interlocutory appeal will be most useful. Persuasive considerations of fairness and judicial economy require that the government be given an opportunity to decide whether to appeal the court's ruling on the constructive service doctrine and, at the same time, that all officers who wish to join the class be bound by the ultimate favorable or unfavorable determination of this issue. At the same time, the court has an obligation to minimize potential delays of recovery for individuals due to appeals of its rulings.

However, the timing provisions of plaintiff's remedial proposal pose significant problems of finality preventing both speedy appellate determination and speedy recovery for individual class members. Appeals from this tribunal may be taken only when it reaches a "final decision"

within the meaning of 12 U.S.C. § 1295(a)(3), certifies an "interlocutory order" within the meaning of 12 U.S.C. § 1292(c), or issues a ruling deemed a "collateral order" under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *See M.A. Mortenson Co. v. United States*, 877 F.2d 50, 51 (Fed.Cir.1989). On the other hand, the Judgment Fund[4] statute, 31 U.S.C. § 1304, prohibits disbursement of money unless the court issues a "final judgment." *See also* Treasury Financial Manual, Vol. I, Pt. 6, Ch. 3100, § 3115 (2000). In the same way, the judgments payment statute for the Court of Federal Claims requires that payment be made only upon a certified full or partial "final judgment." *See* 28 U.S.C. § 2517 (2000). Judgments are final once they "have become conclusive by reason of loss of the right to appeal – by expiration of time or otherwise – or by determination of the appeal by the court of last resort." *See* GAO Office of General Counsel, Principles of Federal Appropriations Law, Vol. III, Ch. 14, at 58 (2d ed.1994) (citation omitted).

Plaintiff's remedies proposal is not appealable as a final decision. The full extent of recovery will not be known, at least for some class members, until they are considered many months into the future by appropriate command and other boards. Considerable efforts and resources will be wasted were individual plaintiffs to proceed with their proving their separate recovery amounts, only to find the case remanded to the Secretary

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[4] Payments for the time forward from the date of judgment generally is made out of the funds of the culpable agency, here the Department of the Army. *See* 55 Comp. Gen. 1447 (1976).

by the Federal Circuit. The proposal also allows for potential adversarial proceedings on fees awarded to attorneys or the consulting fee of Lt. Col. Christian. Individual amounts due to each class member will be initially computed by the Defense Finance and Accounting Service,[5] but, unless each class members [sic] accepts the computation, they are ultimately subject to judicial review. *Cf.* 58 Comp. Gen. 311 (1979). Because of these uncertainties, neither would the proposal qualify as an order of final judgment, and payments to class members will be delayed. On the other hand, any immediate action required of the government with regard to status or payment remedies may implicate the collateral order doctrine and further delay the ultimate recovery through appeals. However, uncertainty over outcome on appeal may be significantly diminished were the government allowed to move for certification of today's decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(c) (2000).

Plaintiff's proposal at this stage may also operate to undermine the utility of the class action device by creating a potential for appeal prior to opting in of all the members. The aim of class action litigation is to resolve common claims through a single track of proceedings which produce a binding result on as many claimants as possible. For plaintiffs, the efficiency inherent in a class action comes at the financial cost of supporting a portion of litigation expenses and the risk that an individual claim will be subject to an adverse global determination. These

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[5] Computations in back pay cases are customarily obtained through a call to the agency head, here, the Secretary of the Army, under RCFC 34 and 28 U.S.C. § 2507(a).

purposes will be defeated if putative members were allowed to sit out the litigation until it was time to collect the judgment. Were the court to direct the administration of remedies and the government chose to appeal, members of the putative plaintiff class other than Lieutenant Colonels Christian and Nix would avoid a large measure of the litigation risk. This misallocation of risk can be corrected through a notification and opt-in process prior to the expiration of time for interlocutory appeal.

IV. CONCLUSION

Today, the court finds that plaintiff and putative class members are entitled to constructive service remedies requested. This ruling does not represent a final judicial determination. Accordingly, the court directs class counsel to submit within thirty (30) days a proposal for speedy notification of potential opt-in class claimants for the limited purpose of joining the litigation prior to the final determination on constructive service remedies. At the conclusion of the notification, the court will allow defendant an opportunity to seek interlocutory appeal of today's decision.

Plaintiff's Motion to Compel is denied as moot.

IT IS SO ORDERED.

APPENDIX C

46 Fed.Cl. 793

United States Court of Federal Claims.

Robert F. CHRISTIAN, II, Plaintiff,

v.

The UNITED STATES, Defendant.

No. 97-165C.

June 5, 2000.

John K. Larkins, Jr., Law Offices of Chilivis, Cochran, Larkins & Bever, LLP, Atlanta, GA, for plaintiff. Nickolas P. Chilivis and J.D. Dalbey, Law Offices of Chilivis, Cochran, Larkins & Bever, LLP, Atlanta, GA, of counsel.

Lt. Col. Billy Nix, U.S. Army (Ret.), Newnan, GA, pro se applicant for intervention as plaintiff.

Armando O. Bonilla, with whom were James M. Kinsella, Assistant Director, David M. Cohen, Director, Commercial Litigaton Branch, and Frank W. Hunger, Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, D.C., for defendant. Lt. Col. Terry L. Elling, Chief, Military Personnel Litigation, and Cpt. Joanne P. Tetreault, Army Legal Services Agency, U.S. Department of the Army, Arlington, VA, of counsel.

OPINION

SMITH, Chief Judge.

This case, and the constitutional claim raised in this case, is not about race. However, it involves deeply held concerns about creating a society free of the scourge of racial injustice that has, during much of our history,

diminished the quality of life for African-Americans as well as other racial, ethnic, or religious minorities. Today, the court is called to examine whether a modern affirmative action program of the United States Army upholds the promise of justice for individuals of all races. This promise is, forever enshrined in the law of the land by the tears and triumphs of the great civil rights struggles of the past century and a half.

How, then, should this court determine whether the program at issue is fundamentally just and consistent with our Constitution? In 1963, Dr. Martin Luther King, Jr. gave the following answer:

> An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts the human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority, . . . and ends up relegating persons to the status of things. Martin Luther King, Jr., *Letter from Birmingham Jail, in* I Have a Dream: Writings and Speeches that Changed the World 83, 89 (James M. Washington ed., Harper Collins 1992).

Racial prejudice is ugly and foul. It not only harms those whom it is directed towards, but it also destroys the souls of those in whose hearts it resides. The military's efforts to eradicate it are praiseworthy in the best sense. Just as our Armed Forces, of all races, have ensured our freedom with the blood of thousands and thousands of our best and brightest, they are now attempting to ensure a military that is focused on merit, but blind to color. That task, however, cannot be achieved by unjust and unconstitutional means, no matter how worthy its goal.

Dr. King himself repeatedly observed that the moral cause of racial justice cannot be fought by immoral means, and that freedoms of whites and blacks are "inextricably bound" to one another. *See, e.g.*, King, Jr., *I Have a Dream, in* I Have a Dream: Writings and Speeches that Changed the World 101, 103 (James M. Washington ed., Harper Collins 1992). Race is a constitutionally suspect classification. Government cannot hire, fire, promote, retire, reward, award, evaluate, or choose on the basis of race. There is no such thing as "separate but equal."

Procedurally, the case is before the court on defendant's Motion to Dismiss and for Judgment upon the Administrative Record, plaintiff's Cross-Motion for Judgment upon the Administrative Record, and plaintiff's Motion for Class Certification. Plaintiff, U.S. Army Lt. Colonel Robert F. Christian, II, claims that he was illegally retired from the Army because the statutes and procedures governing his selective early retirement were violated and because the Army's race and gender-based retention goals and retirement selection procedure violated the equal protection component of the Due Process Clause of the Fifth Amendment. During the course of this litigation, another former Army Lt. Colonel, Billy Nix, filed a Motion to Intervene as plaintiff, pressing substantially the same claims.

For the reasons stated below this court GRANTS Defendant's Motion to Dismiss in part, GRANTS plaintiff's Cross-Motion For Judgment Upon the Administrative Record in part, and GRANTS plaintiff's Motion for Class Certification in part. Additionally, the Court DENIES the Motion to Intervene, but INCLUDES Lt. Col. Nix as a member of the class.

FACTS

In 1980, Congress enacted the Defense Officer Personnel Management Act (DOPMA). Pub.L. No. 96-513, 94 Stat. 2835 (Dec. 12, 1980). Under DOPMA, Regular Army Lieutenant Colonels (LTCs) twice considered but not selected for promotion to Colonel and not placed on another promotion recommendation list may be considered for mandatory early retirement by a Selective Early Retirement Board (SERB). 10 U.S.C. § 638(a)(1) (1997). DOPMA requires that the Secretary of the Army submit a list of officers to the selection board which includes all mandatory retirement-eligible LTCs between the most junior and the most senior LTC to be considered. 10 U.S.C. § 638(e)(2)(A) (1997). The Secretary must specify the number of eligible LTCs which a SERB may recommend for early retirement. Such number may not be more than thirty percent of the number of officers considered in each grade in each competitive category. 10 U.S.C. § 638(a)(2) (1997).

On January 13, 1992, the Secretary of the Army issued a Memorandum of Instruction (MOI) to the SERB contained selection goals and requirements for different LTC career fields and skills. The MOI's substantive selection policies were set forth in Enclosure 1, Guidance, while the MOI deliberation process was set forth in Enclosure 2, Administrative Instructions, ¶ 3, Concept of Operations. The parties stipulated that the SERB followed the MOI. In addition to the description immediately below, the court will also discuss appropriate details along with its deliberations on the various counts.

The Concept of Operations established four phases for the SERB's internal decision making. At Phase I, the

SERB evaluates the records of all officers in accordance with the standards specified in the Guidance (hereinafter Phase I evaluation), assigns a numeric score to each record, and establishes an order of merit list regardless of the career field or skill. As fully discussed below, the Guidance announced a goal for the percentage of minorities and women to be retired and provided different evaluation standards for minorities and women than for officers in general, ostensibly due to possible past personal or institutional discrimination.

At Phase II, the SERB selects from the order of merit the quantity of officers necessary to meet the MOI's optimum number of retirees. The SERB then engages in a statistical comparison of minority and female selections with selections of other officers. Phase II also created selection goals for minority and female officers which called for the SERB to achieve a percent of minority and female officers recommended for retirement not greater than the rate for all officers in the zone of consideration. In evaluating minority and female officers, the SERB was again instructed to take into account past personal and institutional discrimination, as defined in the Guidance, which may have disadvantaged the officer. If the comparisons are unfavorable, either overall or in a certain field, the SERB reevaluates the records of minority and female officers in accordance with the same MOI Guidance standards (hereinafter Phase II reevaluation) and may revote on merit scores assigned to the records (hereinafter Phase II revote) so as to change their place on the list. The SERB then prepares the tentative retirement selection list.

During the last two phases, the SERB engages in adjustments related to career fields and skills. Phase III

involves preparation of separate orders of merit for each career field or skill specified in an annex to the MOI and selection of officers who are not fully qualified or fitting to meet the needs of the Army in those areas. Finally, during Phase IV, the SERB is supposed to conduct a final vote on the list of officers to be retired while ensuring that the Secretarial career field and skill requirements are met. If these requirements were not met during prior steps but the overall optimum number was met, the SERB was to reduce the number of LTCs to be recommended for retirement. The list was to be reduced to a number equal to or greater than the minimum number the SERB could recommend for retirement. If the overall number to retire was already at the minimum level, then the board was to replace LTCs in undesired career fields who were not initially selected for early retirement with LTCs in desired career fields or skills who were initially selected for early retirement. The replacement was to proceed in reverse order of merit.

The MOI Guidance listed a number of factors for evaluation of officer records, to wit: military bearing and physical fitness, military and civilian education and professional training, assignment history and professional development, record of performance, including character, communication skills, and teaching abilities, derogatory information, weight control, medical profiles, the Officer Evaluation Reports (OERs), career development, and marital status. The Guidance, just like Phase II Concept of Operations, also created selection goals for minority and female officers which called for the SERB to achieve a percent of minority and female officers recommended for retirement not greater than the rate for all officers in the zone of consideration. In evaluating minority and female

officers, the SERB was instructed to take into account past personal and institutional discrimination, as defined by the Secretary, which may have disadvantaged the officer. The Guidance defined potential indicia of discrimination to include "disproportionately lower evaluation reports, assignments of lesser importance or responsibility, and lack of opportunity to attend career-building military schools," in effect, setting forth a special standard for evaluation of one's service record. Administrative Record at 189 (hereinafter AR). By its terms, this standard applied both at Phase I and Phase II evaluations. SERB was required to report any failures to meet the goal and explain the situation. The 1992 After-Action Report indicates the revote procedure was used, and that some minority officers were selected for retention following the revote. *See* AR at 123. Women, however, benefitted only from a special Phase I evaluation, because their selection during Phase I comported with the proportionality goals.

The SERB convened January 14, 1992 pursuant to the MOI from the Secretary and recessed on February 6, 1992, recommending the retirement of 1169 LTCs. The Secretary of the Army approved the SERB's recommendations on February 29, 1992, and the plaintiff and others selected for retirement were required to retire no later than August 31, 1992. Eight months after the SERB recessed, Congress enacted a law that amended DOPMA at 10 U.S.C. § 638a. Pub.L. No. 102-484. The newly inserted paragraph, effective October 23, 1992, gives the Secretary the option of submitting all the names of eligible LTCs in a competitive category or submitting the names of LTCs in a competitive category who are also in particular year groups, specialties, etc., as was already the case for lower grade officers. 10 U.S.C. § 638a(c)(3). The sections' language in effect at

the time of the 1992 LTC ACC SERB's deliberations was silent on submissions by criteria within a competitive category, but not expressly prohibitive of such submissions.

Plaintiff applied to the Army Board for Correction of Military Records (ABCMR) for administrative remedy on March 25, 1993. The plaintiff submitted additional comments to his application to the ABCMR on May 31, 1995. On April 10, 1996, the ABCMR denied his request for a hearing and denied all relief requested. On March 14, 1997, plaintiff filed a Complaint in this court and a Motion for Class Certification. On July 14, the defendant filed a Motion to Dismiss and for Judgment upon the Administrative Record. Plaintiff responded with a Cross Motion for Judgment upon the Administrative Record on August 11, 1997. The court heard initial oral argument on October 21, 1997.

On November 4, 1997, plaintiff filed a Motion for Leave to Amend his Complaint, and on May 15, 1998, plaintiff filed a Motion for Leave to Amend his Motion for Class Certification. The new filings related to the Fifth Amendment Due Process claim. The court granted plaintiff's Motion for Leave to Amend his Complaint and Motion for Leave to Amend his Motion for Class Certification on June 12, 1998. Defendant renewed its Motion to Dismiss and for Judgment upon the Administrative Record on September 15, 1998.

Separately, on September 15, 1998, retired Lt. Colonel Billy Nix of the U.S. Army Aviation Corps applied with this court *pro se* to intervene as plaintiff, either as a matter of right or by permission. Applicant Nix was retired by the same SERB as plaintiff, and the Motion to Intervene

alleged interests directly related to those of Lt. Col. Christian.

Plaintiff renewed his Cross-Motion on December 3, 1998. The court heard a new oral argument on the Amended Motions and defendant's renewed Motion to Dismiss on April 1, 1999.

DISCUSSION

Plaintiff's complaint, as amended, contains four counts. The first and second counts allege that the Secretary's MOI and the SERB's compliance therewith violated 10 U.S.C. § 638 and 638a, and Department of Defense Directive (DoDD) 1332.32 and, thus, were illegal and void. The third count alleges that by denying the relief requested in plaintiff's application for administrative remedy, the ABCMR violated 10 U.S.C. § 1552. The fourth count alleges that the Army's race and gender-based goals and revote procedure violated the Due Process Clause of the Fifth Amendment. Plaintiff prays for monetary and other relief.

I. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to entertain all claims presented by plaintiff pursuant to the Tucker Act, 28 U.S.C.A. § 1491(a)(1) (claims for money judgment) and (2) (relief "incident of and collateral to" a monetary judgment) (1997). The money mandating statutes which support the Tucker Act jurisdiction are the Military Pay Act, 37 U.S.C. § 204, and 10 U.S.C. § 1552 (1997). If plaintiff's retirement was "involuntary and improper" under the Constitution or the governing statutes and directives, he retains

his right to active duty pay under section 204. *See West v. United States,* 35 Fed.Cl. 226, 230 (1996). Section 1552, which deals with correction of military records by Armed Services boards, is itself money mandating. *See French v. United States,* 42 Fed.Cl. 49, 53 (1998).

In light of the government's introduction of matters outside the pleadings, the Court will treat its Motion to Dismiss under RCFC 12(b)(4) as an RCFC 56 Motion for Summary Judgment. *See* RCFC 12(b). The same standard applies for the parties' Cross-Motions for Judgment upon the Administrative Record. *See Wells v. United States*, 46 Fed.Cl. 178, 180-181 (2000); *Weaver v. United States,* 46 Fed.Cl. 69, 76 (2000). Summary judgment may be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c). However, "[d]isputes over facts which are not outcome-determinative under the governing law will not preclude the entry of summary judgment." *Wells,* 46 Fed.Cl. at 180-181. Because the parties cross-moved under RCFC 56.1, "each party bears its own burden to demonstrate the lack of genuine issues of material fact [and] the court infers all evidence in light most favorable to the nonmovant." *Weaver,* 46 Fed.Cl. at 75 (citations omitted). However, plaintiff must show by "cogent and clearly convincing evidence" that the ABCMR's decision was arbitrary, illegal, or in bad faith, and that he suffered substantial prejudice as a result. *French,* 42 Fed.Cl. at 56.

II. GOVERNING STATUTES AND PROCEDURES

In his first two counts, plaintiff claims that the 1992 MOI and the actions of the SERB in accordance therewith violated the statutes and procedures governing selective

early retirement, 10 U.S.C. § 638, Selective Early Retirement, and 638a, Modification to Rules for Continuation on Active Duty; Enhanced Authority for Selective Early Retirement and Discharges, as well as DoDD 1332.32, Selective Early Retirement of Regular Commissioned Officers on Active Duty.

The controlling statute, 10 U.S.C. § 638, does not expressly prohibit the Secretary of the Army from dividing up the eligible LTCs into career fields or skills and requiring or recommending retention of a certain number of LTCs in these fields. The government argues that the authority is discretionary and necessary to maintain the objectives of the Army in this era, and this court agrees. There is little less suited for judicial decision-making than the decision over which skill mix will enhance our Nation's defense. In a similar situation involving an Air Force regulation, this court found that "in the absence of a statute prohibiting the Air Force from implementing the regulation in the manner described, the court is without authority to interject itself in this dispute." *Small v. United States,* 37 Fed. Cl. 149, 153 (1997), *aff'd* 158 F.3d 576 (Fed.Cir.1998); *see also Murphy v. United States,* 993 F.2d 871 (Fed.Cir.1993) (review of military personnel decisions is only appropriate where discretion of Secretary of Defense is limited, and Congress has established tests and standards against which a court can measure the Secretary's conduct).

The governing statute states that the Secretary "shall specify the number of officers . . . [a SERB] may recommend for early retirement . . . [and] that number shall not be more than 30 percent of the number of officers considered in each grade in each competitive category." 10 U.S.C. § 638(a)(2) (1997); *accord* 10 U.S.C. § 638a(c)(1) (retaining

the same requirement for temporary modifications of section 638 regarding LTCs). "Grade" means officer rank, in this case LTC, and both parties agree that "competitive category" means non-line versus line officers. *See* 10 U.S.C. § 621; DoDD 1332.32(C)(3); *Small,* 37 Fed.Cl. at 154 n. 4, 156. Thus, the Secretary could not specify a number that the SERB could recommend for retirement that was more than 30 percent of the line LTCs eligible for retirement. Here, the Secretary specified that 30 percent of all line LTCs being considered could be recommended for retirement by the SERB and the actual number retired by the SERB was 25.8%. AR at 104,167-68, 173.

Plaintiff claims, however, that the Secretary did violate the 30 percent cap by specifying a number greater than 30 percent of the LTCs being considered. Plaintiff's theory is that by requiring that certain numbers of LTCs be retained in certain career fields, the Secretary, in effect, removed eligible LTCs from consideration without changing the number of LTCs that could be recommended for retirement. Plaintiff also alleges that by doing so the Secretary also violated 10 U.S.C. § 638(e), requiring submission of a list of all SERB-eligible officers from the most junior to most senior in the grade and competitive category. Plaintiff states, for example, that once the maximum number of Special Forces LTCs that could be retired – six – was achieved, no more Special Forces LTCs could be considered for retirement. The court finds this logic unpersuasive because anyone of the SERB-eligible Special Forces LTCs could end up being one of the retired six. They were all still part of the group that had a chance of being retired. The Secretarial instructions satisfied both the numerical and the enumeration provisions of section 638.

The plaintiff also claims that the Secretary violated DoDD 1332.32 because his MOI disturbed the SERB's independent judgment and the fairness of the process. The plaintiff, however, could not cite a specific example of these values of independent judgment and fairness in the Directive which would contradict Secretarial instructions. The document sets forth only a very general charge concerning fairness and also states that the Secretary may recommend policy changes to the Directive. It does contain an express requirement that the SERB consider all eligible officers. However, as the court found above, the Secretary complied with this requirement. The court GRANTS defendant's Motion to Dismiss and for Judgment upon the Administrative Record for Counts I and II.

III. ABCMR REVIEW

In plaintiff's third Count, he claims the ABCMR violated 10 U.S.C. § 1552 by denying plaintiff's application for an administrative remedy for the alleged illegal acts set forth in Counts I and II. Section 1552 authorizes the Secretary, acting through a board, to "correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." *Id.*

The Court of Federal Claims' review "of the administrative decision is limited to whether the . . . action [of the military board] was arbitrary, capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation, or mandatory published procedure of a substantive nature by which Plaintiff has been seriously prejudiced." *Clayton v. United States,* 225 Ct.Cl. 593, 595, 1980 WL 13179 (1980) (quoting *Sanders v. United States,*

219 Ct.Cl. 285, 298, 594 F.2d 804, 813 (1979)); *King v. United States,* 19 Cl.Ct. 703, 705 (1990). Plaintiff must provide "clearly convincing proof" that the ABCMR acted in such a manner in order to prevail. *Dzialo v. United States,* 5 Cl.Ct. 554, 565 (1984); *King* 19 Cl.Ct. at 705. This court cannot substitute its "judgment for that of the military departments when reasonable minds could reach differing conclusions on the same evidence." *Heisig v. United States,* 719 F.2d 1153, 1156 (Fed.Cir.1983) (quoting *Sanders,* 594 F.2d 804, 813-14, 219 Ct.Cl. 285 (1979)).

Plaintiff argues that his application for administrative remedy and additional comments presented the ABCMR with sufficient evidence to demonstrate bad faith and illegalities. He further reasons that the ABCMR violated 10 U.S.C. § 1552 since it failed to seek an advisory opinion on that additional evidence or, in the alternative, failed to release the opinion to plaintiff, and ultimately denied him relief. Plaintiff made, however, no specific showing that the Board's decision was arbitrary, or capricious, or contrary to the governing statutes or procedures as interpreted earlier with respect to the first two Counts of plaintiff's complaint. Accordingly, the court must grant defendant's Motion to Dismiss as to Count III.

IV. AMENDED COMPLAINT

On June 12, 1998, the court granted plaintiff's Motion for Leave to Amend Complaint, and now explains its ruling in greater detail as follows. Rule 15(a) of this court's rules states that leave to amend a party's own pleading after a response has been served is to be freely given when justice so requires. If, however, a response has not yet been served, a party may amend its own pleadings once as

a matter of right. Other circuits have decided for purposes of Federal Rule of Civil Procedure 15(a) that a motion to dismiss is not a "responsive pleading" and, thus, the plaintiff may not need the leave of the court to file an amendment to his complaint. *See Hopi Tribe v. United States,* 20 Cl.Ct. 782, 784 (1990) (*citing Reuber v. United States,* 242 U.S.App.D.C. 370, 750 F.2d 1039 (9th Cir.1984); *Barksdale v. King,* 699 F.2d 744 (5th Cir.1983); *LaBatt v. Twomey,* 513 F.2d 641, 651 (7th Cir.1975). As this court noted in *Hopi Tribe,* leave to amend a complaint should be granted liberally. This contributes to the rationality and efficiency of the litigation. Regardless of whether a motion to dismiss is a "response," there are sufficient grounds to grant leave to amend.

The practical reasons for granting plaintiff's Motion for Leave to Amend are preservation of judicial resources and reduction in the time and money spent on the dispute by the parties. Granting leave to amend would avoid imposing filing costs, docketing, and the delay inherent in filing a separate complaint. Additionally, justice will be served by allowing the plaintiff to add this question involving common operative facts so that the court may look at the whole controversy. Failure to grant the Motion would also risk the costs of appeal should the issue be decided in favor of the plaintiff.

Defendant's first argument as to why leave should be denied is that the plaintiff has engaged in undue delay by waiting to amend the complaint until after oral argument on the Motion to Dismiss. At the time plaintiff's Motion for Leave to Amend was filed, however, no substantive motion had been decided by the court. Although plaintiff did not attempt to amend his Complaint until almost eight months after filing it, the Motion was filed about three

weeks after the Federal Circuit held in *Baker v. United States,* 127 F.3d 1081, 1088-89 (Fed.Cir.1997), that a separate complaint alleging unconstitutional affirmative action in SERB instructions should be allowed to proceed. The initial dismissal in *Baker* may have discouraged plaintiff from including the proposed amendment in his initial complaint. 34 Fed. Cl. 645 (1995), *vacated,* 127 F.3d 1081.

Defendant also argues that since plaintiff did not raise the new allegation in his appeal to the ABCMR, the waiver doctrine precludes him from making that claim in this court. Generally, under the waiver doctrine, issues and arguments not made before the relevant military correction board or administrative agency are deemed waived and could not be raised in a judicial tribunal. *See, e.g. Laningham v. United States,* 30 Fed.Cl. 296 (1994); *Frecht v. United States,* 25 Cl.Ct. 121 (1992); *Walden v. United States,* 22 Cl.Ct. 532 (1991). Plaintiff, however, points to Federal Circuit precedent holding that although a plaintiff may not generally raise issues involving agency expertise for the first time in this Court, a plaintiff may raise a constitutional claim for the first time in federal court. In *Beard v. General Services Administration,* 801 F.2d 1318, 1321 (Fed.Cir.1986), the Federal Circuit stated that plaintiff's failure to present certain arguments to the Merit Systems Protection Board did not preclude him from raising those contentions before the court. The court went on to state that "the principle of exhaustion of administrative remedies does not always apply to constitutional challenges to the agency's action." *Id.* (citing *Hayes v. Dept. of the Navy,* 727 F.2d 1535, 1539 (Fed.Cir.1984); *Sullivan v. Dept. of the Navy,* 720 F.2d 1266, 1274 n. 2 (Fed.Cir.1983)).

Defendant asks that, if leave to amend is granted, the amended claim be remanded for ABCMR proceedings out of judicial deference for agency expertise. Plaintiff's amended complaint, however, does not deal with issues that the ABCMR has particular experience or expertise in. Plaintiff's proposed amendment deals solely with an issue of law, namely whether or not the MOI given the SERB was unconstitutional on equal protection grounds. The United States Supreme Court has stated that in these circumstances, "[c]onstitutional questions obviously are unsuited to resolution in administrative hearings and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders,* 430 U.S. 99, 109, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). The court cannot shrug this solemn duty off any more than it can aggrandize unto itself matters outside of its jurisdiction.

Finally, the government is not prejudiced by the amendment because the facts that the amendment relies on are already in the Administrative Record, and the court has provided the government ample time and an oral argument to respond to the new claim.

V. FIFTH AMENDMENT DUE PROCESS CLAIM

Plaintiff's fourth Count claims a violation of the Due Process Clause of the Fifth Amendment. Plaintiff alleges that the right to equal protection guaranteed by the Due Process Clause was infringed upon through the imposition of "unlawful gender and racially classified retention goals and selection consideration factors, and unlawful, gender and racially classified remedies for the possible disadvantages of societal discrimination." Am. Compl. ¶ 48.

The SERB was directed to attempt to retire 1,352 LTCs, but required to retire at least 1,127 LTCs. The MOI set forth four phases to this process: Phase I and Phase II are implicated in this case. In relevant part, the MOI stated the following requirement for evaluation of minority and female officers:

> a. The Army is firmly committed to providing equal opportunity for minority and female officers in all facets of their career development, utilization, and progression. *The goal for this board is to achieve a percent of minority and female officers recommended for early retirement not greater than the rate for all officers in the zone of consideration.* This goal is important because, to the extent that each board achieves it, the Army at large will have a clear perception of equal opportunity and the officers not recommended for early retirement will enjoy the opportunity for continued career progression to the benefit of the Army. This goal is not intended as guidance for you to meet any "quota."
>
> b. *In evaluating the records of minority and female officers, the board should consider that past personal and institutional discrimination may have disadvantaged minority and female officers.* Such discrimination may include, but certainly is not limited to, disproportionately lower evaluation reports, assignments of lesser importance or responsibility, and lack of opportunity to attend career building military schools. *Take these factors into consideration in evaluating these officers' potential to make continued significant contribution to the Army.*
>
> c. Prior to recess, the board (in the report of officers recommended for early retirement) must

> review and report the extent to which minority and female officers were recommended at a rate greater than males and non-minority officers. Although the board may have met the overall goals for minorities and women, it will identify any situation in which minority and female selections were not comparable to the overall population in specific branches or where a particular minority-gender grouping did not fare well in comparison to the overall population. Explain such situations fully in the board's after-action report.

AR at 189 (emphasis added).

Phase I required evaluation of minority and female officers in accord with the above factors. *See* AR at 181 (directing the SERB to conduct evaluations in accordance with Enclosure 1 factors). Phase II, which was triggered if the MOI goal for minority and female officer retention was not met, required a re-evaluation of minority and female officers. The Phase I factors for minority and female officers were required to be taken into consideration again during Phase II. In this case, the Phase II revote procedure was triggered for minority officers, although not for female officers. *See* AR at 123.

Plaintiff and defendant disagree as to whether the revote procedure actually displaced members of the class who would otherwise have been retained. However, if the numerical goals, the evaluation factors for past personal and institutional discrimination, and the mere existence of the revote procedure do not meet the Constitution's requirements as plaintiff contends, then it is not necessary to resolve this factual question. Accordingly, the court begins its inquiry with an examination of the factors for the evaluation of minority and female officers.

It is clear on its face that the MOI created a race and gender-based goal and that it required consideration of different factors in evaluating minority and female officers than when evaluating white male officers. The court must now determine whether this policy crossed the line between lawful government action and unconstitutional discrimination.

A. Racial Classification

The general requirements of the Due Process Clause of the Fifth Amendment are quite clear: "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed under strict scrutiny." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Strict scrutiny means that "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id.* at 235, 115 S.Ct. 2097.

The government argues that the MOI does not create a racial classification. The court disagrees. In *Baker v. United States,* 34 Fed.Cl. 645 (1995), *vacated on other grounds,* 127 F.3d 1081 (Fed.Cir.1997), this court found that a Charge to an Air Force SERB to be sensitive to the possibility of past discrimination was not a racial classification in circumstances where there was no goal. The court pointed out that the Charge did not

> mandate that members of the SERB consider race in discharge decisions. The Charge did not establish a quota *or goal* for the percentage of minorities to be discharged. The Charge did not include race in its list of factors that SERB

> members should consider in making separation decisions.

Baker, 34 Fed.Cl. at 656 (emphasis added).

In contrast, the present case is all about a race-based goal. On its face the MOI unequivocally states: "The goal for this board is to achieve a percent of minority and female officers recommended for early retirement not greater than the rate for all officers in the zone of consideration." *See* AR at 189. Moreover, at Phase I, the MOI requires a special evaluation of minority and female officers' records under which "the board should consider that past personal and institutional discrimination may have disadvantaged minority and female officers." *See id.* In addition, the Phase II procedures, requiring the re-evaluation of members of minority groups when their race did not meet the specified goal percentage and, possibly, a revote, gives members of certain races different opportunities from other races, and follows the same MOI standards for "personal and institutional discrimination" as set forth at Phase I. *See id.*

It is clear that the SERB had to apply different standards when evaluating minority officers than nonminority officers. If, to use an example from the MOI itself, a minority officer had not attended an elite military school or was not stationed on a prestigious assignment, the Board would have to consider whether discrimination were a cause of that circumstance. A nonminority male officer, on the other hand, would not receive this benefit. Indeed, under the generally applicable MOI rules quite the opposite is true. As to school attendance, the MOI provides that "[t]he board will not establish selection for or attendance at Command and General Staff College (CGSC), the Army

War College (AWC), or their equivalent, as a substitute for evaluation of an officer." AR at 185. As to tours of duty, the MOI affirms "[t]oday's Army assignment philosophy . . . that all assignments are important assignments." *Id.* at 184. The After-Action Report, likewise, candidly discloses that the SERB equaled one's minority race to another's professional performance. "Of those [minorities] revalidated for early retirement, their overall manner of performance and potential was *clearly below* that of their contemporaries." AR at 169 (emphasis added). Thus, nonminority officers were required to try harder during their careers and held to a heightened standard when evaluated against minorities than against other nonminority officers.

The government admits a racial goal, but emphasizes that its program pursued a goal rather than a quota. As a defense of a race-based affirmative action policy, however, "[t]he . . . rejoinder – that the Policy is not a quota – is a non sequitur." *Wessmann v. Gittens,* 160 F.3d 790, 794 (1st Cir.1998). As the District of Columbia Circuit noted in *Lutheran Church-Mo.Synod v. FCC,* 141 F.3d 344, 354 (D.C.Cir.1998), "we do not think that it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target. As such, they can and surely will result in individuals being granted a preference because of their race." The government's assertion that there were "no resulting repercussions or adverse consequences [to SERB members] for not meeting any/all female or minority selection or retention goals," Def's. Resp. and Reply at 7, even if semantically correct, does not make the classification less suspect. To pressure SERB members into making

racially tainted decisions, the MOI contains a special requirement to "fully explain" SERB's failure to reach the "goals" in an after-action report. Such reporting was plainly designed as a coercive accountability measure, not an innocuous statistical compilation. The Phase II re-evaluation and revote procedures, which kick in should the special evaluation of minorities and women at Phase I fail to produce a desirable racial balance, can each be viewed as special administrative burdens imposed on SERB members.

Even if there were no numerical goal or preordained outcome, the mere existence of special procedures and invocation of special factors for evaluating minorities confirms a suspect racial classification. *See Hopwood v. Texas,* 78 F.3d 932, 937 (5thCir.1996) ("In addition to maintaining separate presumptive TI levels for minorities and whites, the law school ran a segregated application evaluation process.") When the SERB "granted preferential treatment to [minority officers] in its layoff decisions, plaintiff received discriminatory rather than equal treatment." *Cunico v. Pueblo School Dist. No. 60,* 917 F.2d 431, 441 (10th Cir.1990). The SERB was clearly instructed to apply one standard to one racial group and a different standard to another racial group. *See Lutheran Church-MO,* 141 F.3d at 351 ("The crucial point is not . . . whether they require hiring in accordance with fixed quotas; rather, it is whether they oblige stations to grant some degree of preference to minorities in hiring."). When special procedures have been invoked in the past on the basis of racial classification, minorities generally have been the victims. While in this instance the avowed purpose may be benign, the effects of government policies are no less invidious. Shielding these procedures from

judicial review is no less dangerous to minorities, for "by transforming equality into a subjective standard, the concept is reduced to a spoils system, and . . . support for equality will depend on whose ox is gored." Clint Bolick, Unfinished Business: A Civil Rights Strategy for America's Third Century 35-36 (Pacific Research Institute for Public Policy 1990).

The assertion that unequal process for members of different races should not be subject to strict scrutiny is rather curious, to say the least, in the context of Due Process litigation. It is with availability of fair process for all that the Fifth Amendment Due Process Clause is traditionally concerned. Race, on the other hand, "seldom provide[s] a relevant basis for disparate treatment." *See Adarand,* 515 U.S. 200, at 228, 115 S.Ct. 2097, 132 L.Ed.2d 158 (citing *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980)(Stevens, J., dissenting)). The Supreme Court has long recognized such classifications to be "by [their] very nature odious to a free people whose institutions are founded upon the doctrine of equality" before the law. *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943). Government decision-making tainted by suspect, usually arbitrary classifications such as race is a special concern of the Clause. *See, e.g. Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

The government finally claims that the MOI's "limited guidance – rhetorically not offered for 'white men' because this group was never subjected to specific discriminatory acts based upon their race, ethnicity, or gender – cannot be construed as an unconstitutional 'preference' or 'benefit' bestowed upon minority and female officers." Def. Resp. and Reply at 6. This view misconstrues both the applicable

law and its historical foundations. As the Fifth Circuit aptly summarized recent Supreme Court precedent, "there is absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications, including those characterized by their proponents as 'benign' or 'remedial.'" *Hopwood,* 78 F.3d 932, at 940 (citations omitted). As a matter of principle, case law now for over forty years recognized that the requirement of equal protection "is not directed solely against discrimination due to a 'two-class theory' – that is, based upon differences between 'white' and Negro," *Regents of University of California v. Bakke,* 438 U.S. 265, 295, 98 S.Ct. 2733, 57 L.Ed.2d 750 (opinion of Powell, J., announcing judgment of the Court) (citing *Hernandez,* 347 U.S. 475, 478, 74 S.Ct. 667, 98 L.Ed. 866 (1954)), or even between whites and "minorities" in general. Indeed, historically "the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions, for then the only 'majority' would be the new minority of white Anglo-Saxon Protestants." *Bakke,* 438 U.S. at 295, 98 S.Ct. 2733. This court will not help the government exhume a theory long put to rest by the Supreme Court.

The Constitution's scrutiny of racial discrimination covers the entire spectrum of government action, from the sweetest carrots to the heaviest sticks. *See, e.g. Adarand,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (strict scrutiny applied to a federal financial incentive program to hire subcontractors presumed economically disadvantaged because of their ethnicity). A contrary holding would resurrect the ghost of "Jim Crow" and signal that the

federal government may discriminate if the responsible employees are creative or well-intentioned enough. The Supreme Court's pronouncement in *Adarand* is not ambiguous: "All governmental action based on race ... should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." 515 U.S. at 227, 115 S.Ct. 2097 (citations omitted). It is clear that the instructions to the SERB, at evaluation, reevaluation, and during the revote, set forth different procedures for retirement of officers based on race. This policy constitutes a racial classification subject to strict scrutiny.

B. Compelling Interest

When there is a racial classification, the government has the burden of proving that its affirmative action program served a compelling governmental interest. *See Croson,* 488 U.S. at 500, 109 S.Ct. 706; *Wygant,* 476 U.S. at 277, 106 S.Ct. 1842 (plurality opinion). The court finds that none of the interests proffered by the Army, whether nonremedial or remedial, are strong enough to justify a racial classification.

1. Nonremedial Interests.

The MOI statement that the race-conscious goals were "important because, to the extent that each board achieves it, the Army at large will have a clear perception of equal opportunity and the officers not recommended for early retirement will enjoy the opportunity for continued career progression to the benefit of the Army," is an insufficient justification for the racial classification. AR at 189. As the *Croson* plurality noted, "[c]lassifications based on race

carry the danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility." 488 U.S. at 493, 109 S.Ct. 706; *see also Hopwood,* 78 F.3d at 945 ("Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling hostility.").

The government's desire to manipulate private perceptions can never by itself justify the use of race-conscious policies. *See Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion) (1986) (asserted need for more minority role models); *Hopwood,* 78 F.3d 932 (change of perception that the law school is a hostile institution for minorities). Private attitudes are simply too subjective to rely upon as a justification for trampling an individual's right to be treated equally regardless of race. Because of this inherent subjectivity, the thought management rationale may be used to exculpate almost any instance of racial discrimination while simultaneously avoiding any meaningful judicial scrutiny. The Constitution's guarantee of equal protection of the laws presumes that private perceptions will improve when the government treats all persons consistently and even-handedly in both word and deed. But this is more than a mere academic presumption.[1] It is

[1] "In the end, as any successful teacher will tell you, you can only teach the things that you are. If we practice racism then it is racism that we teach." Max Lerner, *We Teach What We Are, in* Actions and Passions: Notes on the Multiple Revolution of Our Time (1949).

a mandate embodied in the law of the land. Discrimination in the name of equality only perverts and retards this principle instead of advancing it. "Racial preferences appear to 'even the score' . . . only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white." *City of Richmond v. J.A. Croson Company,* 488 U.S. 469, 527-528, 109 S.Ct. 706, 102 L.Ed.2d 854 (Scalia, J., concurring in judgment). Without question, it is a legitimate goal to "have a clear perception of equal opportunity," but this court likewise concludes it is not a compelling government interest justifying separate procedures based upon race.

The fact that the minority officers retained will enjoy additional opportunities could be a compelling interest of the government's if there is a special interest in minorities enjoying such opportunities which is not possessed by other groups. This justification amounts, in practice, to the diversity or role models rationales rejected by the Courts of Appeals in other affirmative action contexts. *See Lutheran Church-MO,* 141 F.3d 344, 355 (D.C.Cir.1998); *Wessmann,* 160 F.3d 790, 796 (1stCir.1998); *Hopwood v. State of Texas,* 78 F.3d 932 ("[W]e see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional.") (5thCir.1996); *Podberesky v. Kirwan,* 956 F.2d 52, 56 n. 4 (4th Cir.1992). The court does not see how race could possibly be relevant in this context and the government has not proposed that minority officers possess different intrinsic qualities than nonminorities. Were it to try to do

so, the government's position would be on thin constitutional ice indeed. The court holds that no compelling interest exists for this purpose.

The government argues, however, that the MOI "furthers a compelling Government interest in preventing possible past discrimination against a particular minority officer from detrimentally affecting the Army's present consideration of that officer's professional attributes and potential for future contributions if retained on active duty." *See* Def. Resp. and Reply at 37. This justification is not actually remedial: the government is setting forth a compelling interest in accurately assessing the professional attributes of the officers it reviews for retirement selection. The court finds a compelling interest would exist for the Army in such endeavors. But this program is not actually particularized as the government contends. The distinction here is subtle, but decisive, and turns on the phrase "possible past discrimination". By being a member of a minority race, an officer receives a particular interpretation of his past record, including but not limited to such things as assignments and military schools attended. Specifically, the MOI instructs the SERB to take into account that lower achievements of minority and female officers in certain areas "may" indicate discrimination. This is not the same thing as a finding that the particular minority officer was in fact discriminated against. Such an interpretation of the record does nothing to help the Army to accurately assess whether, in fact, that record was tainted by discrimination. This court will not infuse a compelling interest proffered during litigation into a racial classification scheme which is irreconcilable with that interest.

2. Remedial Interests.

The court finds, however, that the government has alleged a compelling government interest: remedying "actual past discrimination." In light of the MOI and the Declaration of Lt. General Frederick E. Vollrath, the U.S. Army Deputy Chief of Staff for Personnel (DCSPER), the court concludes that remedying actual past discrimination was a motivation for the Army's policy. Remedies for actual discrimination against the individual appear to be supported by a compelling interest under any current theory of the Due Process Clause. Justice Scalia's rigorous view of strict scrutiny requirements, currently the minority view, would be satisfied by this understanding of the Army's affirmative action program. *See Adarand,* 515 U.S. at 239, 115 S.Ct. 2097 (Scalia, J., concurring) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as a creditor or a debtor race.") (citations omitted).

However, courts are not obligated to receive proffered remedial reasons as fact and rubber-stamp the government's race-based programs. *See Croson,* 488 U.S. at 500, 109 S.Ct. 706 (citing *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975)). If this were the case, a clever lawyer could justify every single act of racial discrimination imaginable. Rather, "where the [government] actor puts forth a remedial justification for its racial classifications, the court must make a 'factual determination' as to whether remedial action is necessary." *Wygant,* 476 U.S. at 277-278, 106 S.Ct. 1842. Because

there is no Federal Circuit precedent on the precise contours of such inquiry, this court adopts the test put forth by the Fifth Circuit in *Hopwood v. Texas,* 78 F.3d 932 (5thCir.1996).[2] Under *Hopwood,* the government must first and foremost provide the court with a "showing of prior governmental unit involved." 78 F.3d 932, 949 (citing *Wygant,* 476 U.S. at 274, 106 S.Ct. 1842 (plurality opinion) and *Hazelwood Sch. Dist. v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977)).[3] Second, "the relevant governmental discriminator must prove that there are present effects of past discrimination of the type that justify the racial classifications at issue." *Hopwood,* 78 F.3d at 952 (5th Cir.1996). The evidence presented by defendant before the court in support of its race-based scheme falls far short of *Hopwood's* requirements.

As to the first prong, the court finds the MOI invalid because the relevant governmental unit here is the SERB and not the Army in general. Where an affirmative action program is imposed in a setting different in kind from the

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[2] The court is satisfied by the extensive analysis of Supreme Court jurisprudence by the *Hopwood* court and notes that a similar test was articulated by the Fourth Circuit in *Podberesky v. Kirwan,* 38 F.3d 147, 153 (4th Cir.1994), *cert. denied,* 514 U.S. 1128, 115 S.Ct.2001, 131 L.Ed.2d 1002 (1995) ("To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program.").

[3] This court agrees with the Fifth Circuit that post-*Wygant* Supreme Court jurisprudence further restricted allegedly remedial racial classifications to specific agencies that committed the racial wrongs which are sought to be remedied. *See Hopwood,* 78 F.3d at 949-952 (discussing *Croson* and other cases).

setting in which a supposed violation occurred, courts infer that the program is either motivated by some impermissible interest or is not narrowly tailored. *See Croson,* 488 U.S. at 469, 109 S.Ct. 706 (city's focus on discrimination in the construction industry at large "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."); *Hopwood,* 78 F.3d at 951 ("In this situation, an inference is raised that the program was the result of racial social engineering rather than a desire to implement a remedy.") These inferences arise because "when one [actor, the 1992 LTC ACC SERB,] begins to justify racial preferences based upon the actions of other [Army] agencies, [such as promotion boards, unit commanders, etc.,] the remedial actor's competence to determine the existence and the scope of the harm – and the appropriate reach of the remedy – is called into question." *See Hopwood,* 78 F.3d at 951. Equal protection caselaw abounds with examples where comparably disparate settings were rejected as improper for remedial programs. Thus, the Supreme Court in *Croson* struck down the racially preferential contracting scheme by the City of Richmond which allegedly targeted discrimination in the construction industry nationwide. Likewise, the *Hopwood* Court found that the University of Texas School of Law could not administer an affirmative action plan supposedly to remedy racial discrimination in the secondary schools of the State of Texas or the undergraduate institutions of the University of Texas System.

The proffered remedial scopes in these cases are simply dwarfed by the breadth of the so-called remedy in the MOI. The commands, agencies, schools, installations, recruitment facilities, and duty stations of the United States Army literally span the planet. *See, e.g.* 1998

Statistical Abstract of the United States, 357-368 (118th ed.). Every year, the Army's numerous promotion, disciplinary, and retirement boards convene to make personnel decisions. Various military school selection boards, some operating jointly with other service branches, make thousands of admissions decisions. Unit commanders and personnel authorities routinely execute tens of thousands of duty station assignments. In contrast, the SERB as an institution was established with a limited mission in mind: to evaluate retirements of a certain number of Lieutenant Colonels for the 1992 fiscal year. However, by directing SERB members to accord special consideration to promotions, assignments, and military school attendance of minorities, the MOI magically transformed the 1992 LTC SERB into a super-prosecutor and a super-judge of racial discrimination practices in other Army units and boards, encumbered neither by scope, nor time, nor, apparently, evidence.

Assuming *arguendo* that the relevant governmental discriminator is the entire Department of the Army, defendant's compelling interest argument still suffers from constitutionally fatal flaws. Specifically, the meaning of "actual past discrimination" needs clarification. It appears that the regulations themselves address personal and societal discrimination, *see* AR at 189, which do not provide a compelling interest. *See Croson,* 488 U.S. 469, at 497-500, 109 S.Ct. 706 (1989). Most troubling is the express creation of a separate evaluation and revote process for minorities because they may have been disadvantaged by "past personal discrimination." It is well-settled that the government may never assert private racially intolerant attitudes as a pretext for the government's own racial classification. *See Palmore v. Sidoti,* 466

U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). As the Supreme Court declared in that case:

> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations . . . We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume are widely and deeply held.' *Palmer v. Thompson,* 403 U.S. 217, 260-261, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971) (White, J., dissenting).

Id. 466 U.S. 429, 433, 104 S.Ct. 1879.

Private personal discrimination does not supply a compelling interest for a racial classification. If allowed, it would make all racial classifications permissible upon a subjective showing that a person had been discriminated against somehow, somewhere, or by someone, without more.

Equally as troubling is the requirement that the evaluation of minority and female officers take into account a "lack of opportunity to attend career-building military schools." AR at 189. This "lack of opportunity" factor is all-encompassing in its reach. It indicates what social order – one full of opportunities – should have existed throughout the lives of minority and female officers, and presents an open invitation for speculation by SERB members in accordance with their own ideal world

theories. This, in turn, indicates that the Army impermissibly sought to remedy past societal discrimination, and not simply "actual past discrimination." *See Wygant,* 476 U.S. at 276, 106 S.Ct. 1842 (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.") As noted in *Croson,* "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight." 488 U.S. at 501, 109 S.Ct. 706. It seems clear from the goal itself that one purpose of the program, the remedying of "personal discrimination", does not pass constitutional muster. Likewise, to the extent the remedy for "actual past discrimination" includes the remedy for "societal discrimination," the court accordingly holds that no compelling interest existed for this purpose.

The government also fails the second prong of its evidentiary burden, one concerning present effects of past discrimination. The Supreme Court has held that the government must have "a strong basis in evidence for its conclusion that remedial action was necessary." *Croson,* 488 U.S. at 500, 109 S.Ct. 706 (quoting *Wygant,* 476 U.S. at 277, 106 S.Ct. 1842 (plurality opinion)). Although there would be a compelling interest in remedying actual discrimination, the government must prove that such a remedy was needed. In this case, the evidence presented to the court is largely statistical evidence that minorities were promoted at different rates from white officers. *See generally* Vollrath Dec., Ex. F. Moreover, the author of the report relied upon by the government to explain these statistics appears to use an interpretation of the Army promotion data which counts societal discrimination as part of the harm to be remedied: "[I]nstitutional discrimination is a difference in what happens to people in an

organization – a difference which 1. is correlated with skin color; 2. results from the normal functioning of the organization; and 3. operates to the consistent disadvantage of persons of a particular skin color." *Id.* at 402. It is, finally, unlikely in this case that a compelling interest existed to remedy discrimination against all minorities.[4] *See Croson,* 488 U.S. at 506, 109 S.Ct. 706 ("The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.").

The Declaration presented by the Army to explain its program, however, expresses doubt about the meaning of the statistical disparities in promotions between different groups of officers. According to Lt. Gen. Vollrath, "[I] oversaw an examination into the reasons for the persistent discrepancy in these promotion rates. *We were unable, however, to definitively pinpoint any single systematic reason for the disparity we observed.* It was because of this *uncertainty* that the Army instituted the EO 'review' and 'revote' procedure. This procedure was crafted to examine on a board-by-board basis *the possibility* that some of the

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[4] Minority groups other than blacks were only studied separately beginning in 1980. The evidence as to Hispanic officers indicates that they were promoted in many areas at a faster rate than other officers. *See* Ex. F. The government has not included an analysis of the statistics for the Asian/Pacific Islanders group, but they exceeded the statistics for whites in many years, and do not show a great disparity (in some years in which this group did less well, it coincided with a small officer pool). The statistics for American Indians, the government concedes, are not statistically significant due to the small numbers of eligible officers, but they show a number of years in which the percentage was higher than for whites or the eligible officer pool. As for female officers, the very government study the Army submits declares: "Army women have been promoted more rapidly than their male counterparts to almost every officer and enlisted grade, except grade 07." *Id.* at 579.

aggregate pattern we were observing was due to some actual discrimination against particular individual members of these ethnic and gender minority groups." Vollrath Dec., ¶ 62 (emphasis added). These so-called findings are a far cry from "'pervasive, systematic, and obstinate discriminatory conduct' [necessary to] justif[y] a narrowly tailored race-based remedy." *Adarand,* 515 U.S. at 237, 115 S.Ct. 2097 (citing plurality, concurring, and dissenting opinions in *United States v. Paradise,* 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987)). There is an obvious concern that the Army's plan was not addressing the present effects of past discrimination, but merely statistical disparities it did not like, whatever the reason for their existence.

The government argues that the revote procedure at Phase II is based on actual discrimination because it is only triggered when the percentage of minority officers selected for retirement is not in proportion to the general selection rate. The court finds this logic misleading, for there is no evidence that the failure to meet the Army's chosen racial percentage goal was caused by discrimination in the first place. The government thus bootstraps inconclusive data onto a racial classification and then purports to justify that classification on the basis of bare statistical variations in the data. As a result, defendant completely sidesteps any inquiry into the root causes of these statistical differences. However, even if Phase II revote is limited to "actual discrimination", the special evaluation or reevaluation at Phases I or II used a racial classification which applied irrespective of the percentages in a particular year. The court rejects the government's contention that only the revote procedure could raise constitutional issues. During the evaluation or the reevaluation,

the SERB was required to take into account the possibility of "past personal and institutional discrimination" upon its review. This affirmative action could only have been justified by the government's statistical and anecdotal evidence, and not on the later failure to achieve the MOI numerical goal. Indeed, as plaintiff notes, the special record evaluation and revaluation also applied to female officers, and thus provided them a benefit, even though the revote procedure was not applied to them in 1992.

The Army's reliance on simple proportionality comparisons between races is not probative of discrimination, for such comparisons are appropriate for use in entry level positions cases only. *See Croson,* 488 U.S. at 501, 109 S.Ct. 706 (1989). Here, on the other hand, careers of skilled professional officers are at stake. "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* at 502, 109 S.Ct. 706. Nothing in the record before the court indicates that such an inquiry was ever made before the MOI was prepared. Accordingly, the Army should have conducted fact finding to determine the strength of the statistical evidence as proof of institutional, not societal or personal, discrimination, and whether the statistics so considered provide convincing evidence of a compelling government interest in remedying racial discrimination. As for the revote procedure, the record likewise does not indicate that sufficient evidence of institutional discrimination is provided by the revote process to create a compelling interest. Part of this inquiry would depend on the government's ability to distinguish those minority officers who benefitted from the "personal discrimination" remedy from those who benefitted from

the "institutional discrimination" remedy. Based upon the Administrative Record and the government's evidentiary submissions in support of the affirmative action program, there is no genuine issue of material fact regarding the existence of a compelling interest. The government will not be able to carry the evidentiary burden due it in equal protection cases, *see Hopwood,* 78 F.3d at 948-950, and, accordingly, a trial is unnecessary.

C. Narrowly Tailored

This case may also be resolved without recourse to trial, and plaintiff's Cross-Motion for Judgment upon the Administrative Records may be granted if the government's affirmative action policy is not narrowly tailored. As the *Adarand* court explained, even with a compelling governmental interest, the racial classification "must be narrowly tailored to further that interest." 515 U.S. at 235, 115 S.Ct. 2097. Indeed, "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.* at 236, 115 S.Ct. 2097 (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 535, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (Stevens, J., dissenting)).

1. *Less Intrusive Means*

The Army's tailoring of its policy to cover "personal discrimination," at both Phases I and II, is unconstitutional. Also, the government has not shown how "institutional discrimination" is different from societal discrimination. As was explained above, remedying societal discrimination is not a compelling government interest. Indeed, the Army's

remedy for societal discrimination is not particularly well-tailored to that purpose, as it instructs the SERB to take into account societal discrimination which "may" have had an impact on the officer. Assuming, *arguendo,* the constitutionality of the affirmative action remedy in all other respects, the goal and revote procedure should have required consideration of "institutional discrimination" alone, omitting reference to the wrongs of society or individuals. By not doing so, the policy failed the constitutional requirement that it be "narrowly tailored."

In fact, the government's view of this case in terms of remedying discrimination in Army promotions underlines how difficult it would be for this affirmative action plan to meet strict scrutiny. Affirmative action in minority retirement selection is not the least intrusive means to remedy Army discrimination in promotions. In *Wygant,* the plurality rejected a plan which involved termination of senior nonminority teachers to retain less senior minority teachers. The plurality concluded that the plan was not narrowly tailored because "[o]ther, less intrusive means of accomplishing similar purposes – such as the adoption of hiring goals – are available." *See Wygant,* 476 U.S. at 283, 106 S.Ct. 1842.[5] Although the facts of this case are less severe than in *Wygant* – minorities merely receive an opportunity to be retained which is unavailable to nonminorities – the applicable rule is identical. There are less

[5] Justice O'Connor, concurring, did not reach the issue of hiring goals versus layoffs. *See Wygant,* 476 U.S. at 293-294, 106 S.Ct. 1842 (O'Connor, J., concurring). However, she did not disagree with the plurality's substantive reasoning, and her opinion in *Adarand* requires this court to apply strict scrutiny to all racial classifications.

intrusive means of battling the effects of discrimination in Army promotions.

The government could always use targeted affirmative action measures at the hiring or recruitment stage to remedy past institutional discrimination in promotions. Additional promotions might be made as long as there was no discrimination based on race against nonminority officers. To the extent affirmative action goals were necessary to remedy prior discrimination, promotion goals implemented at a board responsible for the identified institutional discrimination would show the most exact connection with the least intrusive burden. As a result, there is not "the most exact connection" between the justification and the classification in this instance.

2. Duration of the Policy

Racial and gender classifications based on remedying past discrimination may not have an infinite life span; to be narrowly tailored, there must be some circumstance which would end the need for the affirmative action policy. Thus, the *Adarand* Court remanded to the Court of Appeals because that court had not decided, under the strict scrutiny standard, "whether the program was appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate." 515 U.S. at 238, 115 S.Ct. 2097 (citations and quotations omitted). In *Wygant,* the plurality eschewed a "role model" justification for an affirmative action plan because it "allows the Board to engage in discriminatory and layoff practices long past the point required by any legitimate remedial purpose." 476 U.S. at 275, 106 S.Ct. 1842. *See also Croson,* 488 U.S. at 510, 109 S.Ct. 706 (noting importance of

findings "to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter."); *Wygant,* 476 U.S. at 310, 106 S.Ct. 1842 (plurality opinion) ("In the absence of particular findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."). As the *Wygant* plurality stated, there must be some "logical stopping point." *See Wygant,* 476 U.S. at 275, 106 S.Ct. 1842. None exists for the Phase I minority selection standards, and likewise, upon a closer look, for Phase II reevaluation and revote procedures.

In *Stewart v. Rubin,* 948 F.Supp. 1077 (D.D.C.1996), a promotion case permitting reevaluation for minorities upon which the government puts great weight in support of its program, the court explained that one of the reasons its reevaluation procedure was narrowly tailored was its short and definite duration. That "interim procedure [was] also short term – i.e., it will not be used once the new promotion systems are implemented. The temporary nature of the provision [was] an important factor in support of approval." *See id.* at 1098. No such protections are in place here. The government in this case has not stated that its program will end for female officers when there are no longer former members of the WAC in the Army, or that it will not use the MOI affirmative action guidelines in future years, or that certain concrete evidence that there is no longer a compelling interest in remedying past Army discrimination will terminate the affirmative action policy. Instead, it appears that this program may continue for as long as the Army makes use of SERBs.

Defendant argues its affirmative action plan is of temporary duration because the revote procedure is only

triggered where a goal is not achieved. It would, under that theory, no longer be triggered when the Army no longer has racially unbalanced statistics. But a mere failure of the SERB to meet the Army's self-imposed goal is not discrimination. Failure to meet the goal would not, on its own, constitutionally justify a revote. If, for example, twenty years passed, anecdotal evidence was minimal, and promotion rates were identical across races and gender, there is no assurance the revote would not still be triggered whenever a SERB failed to meet its goal. This is not indicative of a short duration. Furthermore, notwithstanding the fact that the revote procedure has no obvious end date, the government's argument fails because the goal itself is a racial classification which applies at both phases of the SERB procedure.

3. Race-Neutral Alternatives.

"In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies." *United States v. Paradise,* 480 U.S. 149, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987). The government has not, on this record, attempted race neutral alternatives prior to implementing its affirmative action program. *See Croson,* 488 U.S. at 507, 109 S.Ct. 706 (expressing concern with an affirmative action plan because "there does not appear to have been any consideration of the use of race-neutral means.").

One neutral possibility would be to apply the goal and revote procedure to all races and both genders. The government appears convinced that race and gender discrimination has not harmed white male officers. But presumably the symptoms of race and gender discrimination, which the

government assures the court its SERB was highly trained to detect, see Def's. Br. at 32, would also be recognizable if they ever occurred in the white male context. This remedy might require more time and effort, but, as discussed in the *Baker* case, it has been used before. Moreover, administrative efficiency is no excuse for a racial classification. *See Croson,* 488 U.S. at 508, 109 S.Ct. 706 ("[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of past discrimination cannot justify a rigid line drawn on the basis of a suspect classification.").

Another possibility would be to provide additional training and preparation for top military schools or prestigious assignments to officers from educationally underprivileged backgrounds of all races. This approach will expand the pool of qualified applicants by benefitting those who were in fact denied opportunities for advancement due to discrimination and other factors. It will provide real assistance to real victims. This approach will also help address any societal discrimination concerns the Army may have, yet without employing a suspect classification.

4. Additional Problems.

Another concern about the affirmative action program would apply to the "institutional discrimination" remedy. Among examples of institutional discrimination provided in the MOI which the SERB should look for are assignment to a station of lesser importance or responsibility and disproportionately lower evaluation reports. The difficulty with these standards is that they do not eliminate instances in which an assignment of lesser importance came from

non-discriminatory sources (including the personal wishes of the officer), or instances in which the lower evaluation report came from simple poor officer performance. There is no evidence in the record providing a standard which distinguishes the different causes of lower officer evaluations. On its face, the program appears to protect minorities and female officers who did not suffer from past discrimination. Thus, a hypothetical SERB officer is likely to read the MOI and provide a revote to a minority officer who had a low evaluation report who had never been discriminated against. A nonminority officer, in the same context, would not receive this benefit. The government argues against such possibilities because of the equal opportunity training it provides to its officers, but this does not change the fact that the racial classification leaves these factors open to broad discretion. Such a discretion violates the requirement that the remedy be narrowly tailored.

Recent circuit court decisions have held that compelling interests do not include the desire to protect a race from underrepresentation: "Underrepresentation is merely racial balancing in disguise – another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions." *Wessmann,* 160 F.3d 790, 799 (citing *Lutheran Church-MO,* 141 F.3d at 352). Racial balancing, of course, is not an acceptable justification for a racial classification, and the court finds these holdings persuasive for that reason. The government's policy appears to be tailored to prevent underrepresentation, and not to remedy past racial discrimination. Notably, the revote procedure would not be triggered to protect a victim of past discrimination who was selected in a year when his or her overall race or gender group did

well compared to all eligible officers. Female officers did not benefit from the revote procedure during the 1992 FY SERB, yet this fact hardly indicates that female officers were not harmed by past discrimination if the government's interpretation of statistical and anecdotal evidence is to be believed.

In *Wessmann v. Gittens,* 160 F.3d 790 (5th Cir.1998), the plaintiff, Sarah Wessman, had been denied admission to an "examination school," Boston Latin School (BLS), and sued under the Equal Protection Clause of the Fourteenth Amendment. Examination schools are public secondary education institutions operated by the City of Boston, which require entrance examinations for admissions. BLS had used a complex admissions system, under which an applicant had to be in a qualified applicant pool (QAP), which was comprised of the top 50% of the applicants to the school, ranked by a combination of the applicant's test score and grade point average. Half of the admissions were then based entirely on the applicant's ranking. The other half were decided based on the proportions of each race in the remaining qualified applicant pool (RQAP), after the top half was removed. BLS would fill its remaining open seats based on rank order, but only insofar as the number of students from each racial/ethnic group matched its proportion in the RQAP.

The *Wessmann* court found the affirmative action program was not narrowly tailored because, among other reasons, if one racial minority did particularly well in one year, and was poorly represented in the mQAP, it could be displaced by white and Asian students. Although the affirmative action program in this case does not function with the potential to discriminate against its alleged beneficiaries, it does ignore their plight whenever the

number of minorities or women selected for retention is especially high. This indicates a greater emphasis on racial and gender percentages than on rectification of tangible past wrongs. The revote procedure, thus, "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson,* 488 U.S. at 507, 109 S.Ct. 706.

The court concludes that the Army's affirmative action program for the 1992 FY SERB was not narrowly tailored, and therefore violates the Due Process Clause of the Fifth Amendment. Both the evaluation aimed at attaining the goals and the revote procedure, if the goals are not met, call for the SERB to "take into consideration" factors including "but certainly not limited to, disproportionately lower evaluation reports, assignments of lesser importance or responsibility, and lack of opportunity to attend career-building military schools." AR at 189. A racial classification tailored to remedy personal and societal discrimination and to assure racial balancing is included at both stages, and, not surprisingly, does not come close to the exact fit required of a constitutional remedy for institutional discrimination.

D. Gender Classification

The MOI goal and revote procedure represent a gender classification for the same reasons stated above in the racial classification context. *See* AR at 188-9. Without repeating that discussion, the court simply notes that the MOI incorporates female officers into the identical policy required for minority officers. The standard of review for gender-based classifications is intermediate scrutiny. *See Mississippi University for Women v. Hogan,* 458 U.S. 718,

724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

However, in a recent decision on gender-based classifications, *United States v. Virginia,* 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), the Supreme Court emphasized that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Id.* 518 U.S. at 529-531, 116 S.Ct. at 2274 (citations omitted). The Court did not indicate it was overruling its precedent of intermediate scrutiny, and cited cases which applied the intermediate scrutiny standard in support of its opinion. Previously, the Supreme Court has cautioned lower courts that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decision." *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). For precisely this reason, the Eleventh Circuit has applied the *Virginia* case as a continuation of the intermediate scrutiny standard for gender-based classifications. *See Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County,* 122 F.3d 895 (11th Cir.1997) (holding that remedy for societal discrimination is permitted under intermediate scrutiny).

Without delving further into this issue, the court believes its holding with respect to the unconstitutional racial classification is sufficient to grant summary judgment

to plaintiffs on Count IV. "When a case presents two constitutional questions, one of which disposes of the entire case and the other of which does not, resolution of the case-dispositive question should suffice." *American Mfr. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 62, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (Ginsburg, J., concurring in part and in judgment). In this case, the conclusions that the racial classification contained in the Army's MOI was not narrowly tailored to meet any compelling government interest and that no compelling interest was present renders unnecessary any decision on the gender-based classification contained therein. Any nonminority male was potentially harmed by the constitutional infirmity of the race-based selection standards mandated by the Army, since any such officer could theoretically have received a closer and more deferential evaluation or a revote if it had such a benefit, at Phase I or at Phase II. The harm would be identical whether or not the gender-based program is constitutional, since the standards applied by the SERB were the same for both minority and female officers. The court hereby GRANTS plaintiff's Motion for Summary Judgment on Count IV.

VI. CLASS CERTIFICATION AND MOTION TO INTERVENE

The Court of Federal Claims possesses broad discretion in determining whether a class certification is appropriate. *See* RCFC 23 ("The court shall determine in each case whether class action may be maintained and under what terms and conditions."); *cf.* Fed.R.Civ.P. 23 (setting forth mandatory criteria for determining propriety of class actions). In *Quinault Allottee Ass'n v. United States,* 197 Ct.Cl. 134, 453 F.2d 1272 (1972), several factors were

suggested to consider when deciding a motion for class certification. The court should consider whether: 1) there is a large but manageable class; 2) a common question of law; 3) a common legal question that predominates; 4) plaintiff's claim is typical; 5) the challenged government action is generally applicable; 6) claims of the purported class are too small to be pursued individually; and 7) plaintiff will adequately represent the interests of the purported class.[6] The court also considers whether certifying the class would serve the overall interests of justice by addressing possible statute of limitations problems or other concerns. *See Berkley v. United States,* 45 Fed.Cl. 224, 234 (1999).

None of the above factors, together or separately, represent a hard-and-fast rule. *See id.* at 229. Rather, in light of this court's jurisdiction over non-tort claims for money damages against the United States, the propriety of class certification is evaluated in light of the type of the substantive claim pending before the court and the facts out of which it has arisen. This case requires the court to evaluate the propriety of class actions in federal employment compensation cases.

In his Motion for Class Certification, as amended, plaintiff proposed two classes for the court's consideration.

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[6] The eighth *Quinault* factor, assessing the risk that individual actions would create varying adjudications, is moot in light of post-*Quinault* statutory changes making the decisions of trial courts under the Tucker Act and the "little Tucker Act" subject to appellate review exclusively in the Federal Circuit. The only exception to this exclusive review scheme are the tax claims brought under the "little Tucker Act." *See Berkley,* 45 Fed.Cl. at 234 (1999) (citing case law interpreting 28 U.S.C. §§ 1295(a)(2) and 1346(a)(2) (1994)).

The first, or original, class consists of four alternative classes. The first alternative encompasses all Army Lieutenant Colonels retired by the SERB. The second and the third such alternatives include all Lieutenant Colonels in several specified categories who were retired by the SERB. The fourth alternative is limited to retired Lieutenant Colonels in plaintiff's field, Air Defense Artillery. The second, or amended, class consists of all male non-minority Lieutenant Colonels retired by the SERB. The proposed classes are tailored to substantive claims in plaintiff's Counts, with the four alternatives in the original class related to the first three Counts and the amended class related to Count IV.

With respect to Counts I through III, plaintiff's harm stems from the fact that he was a member of an undesired career field or skill and that he was mandatorily retired – an individual claim. In applying the *Quinault* factors, the court determines, among other things, that there is not a question of law common to the whole class and that the plaintiff's claim is not typical of the whole class. Plaintiff's claim turns on his particular circumstances – his career field, skill, and, notably, his military record. This hinders his ability to protect class members' interests as well, since all the LTCs mandatorily retired by the SERB were in different career fields or skills, and, if the action by the SERB were illegal, it would affect the LTCs who were retained as well. In light of the court's finding of broad Secretarial discretion to use the SERB process to address the personnel needs of the Army, potential factual differences between the military record of the plaintiff and other class members are even more significant. Finally, it appears that plaintiff's allegation of arbitrary and capricious review by the ABCMR rests on that Board's failures

to get an advisory opinion or to provide its opinion to plaintiff – actions which are peculiar to plaintiff's claim. For these reasons, plaintiff's Motion for Class Certification as to the first three counts is DENIED for the entire original class.

Count IV, however, raises an entirely different set of issues. All male non-minority LTCs selected for retirement by the 1992 SERB, i.e. all members of the amended class, were excluded from the benefits of the Army's Phase I and Phase II minority racial or gender factors and goals; likewise, all such individuals were excluded from the benefits of the revote procedure. The analysis for Count IV parallels the application of *Quinault* factors in *Berkley v. United States,* 45 Fed.Cl. 224 (1999), another recent case involving racial and gender discrimination in separation of military officers from service. *Taylor v. United States,* 41 Fed.Cl. 440 (1998), is instructive as well.

Accordingly, the court finds that the male nonminority officers selected by the SERB for retirement would comprise a large but manageable class. While the record before the court contains data by separate race and gender categories, it does not show the exact number of male nonminority Lieutenant Colonels retired by the SERB at issue. The unavailability of the precise number of potential plaintiffs is a function peculiar to the secrecy with which SERBs operate to protect the privacy of individual officers and the integrity of their internal decision-making. However, at oral argument, the parties did not dispute existence of a large, but manageable class as to Count IV. Were the issue contested, the parties could have petitioned for the court's assistance to craft discovery measures adequate in scope and subject to appropriate protections. As in *Berkley* and *Taylor,* the potential class members are

connected with, and easily identifiable through, the Army records. They are presumably receiving regular communications from defendant related to their retirement. As every other Rule, RCFC 23 "shall be construed to secure the just, speedy, and inexpensive determination of every action." RCFC 1(a)(2). Finding that the first *Quinault* prerequisite is satisfied advances this principle.

The court also notes that the issue of constitutionality of the MOI in light of the equal protection commands of the Due Process Clause is common to amended class members selected, and that the nature of this legal issue renders factual differences among class members practically irrelevant. The second and third *Quinault* factors are satisfied where the legal claim asserted by all potential class members has a defense which is also applicable to all, and where a common legal determination as to liability is possible regardless of the potentially varying determinations as to remedies. *See Berkley,* 45 Fed.Cl. at 232 (relying on *Taylor,* 41 Fed.Cl. at 446). The liability for subjecting the amended class members to unconstitutional racial classifications and discriminatory procedures is but a single question of law. Any and all of the government's defenses, if sustained, would have justified the harm commonly suffered by all class members because of their gender and race. The defenses, even the so-called remedial justifications, were not based on factual distinctions between the amended class members. Further, plaintiff clarified the amended class definition to exclude certain officers based on a finding of unsatisfactory performance by the Army Grade Determination Board. Any other factual differences among the potential class members are relevant only in the context of determining damages and other relief, such as correction of records.

Plaintiff, a white male, certainly presents a case typical to others in the amended class in light of allegations in Count IV. The MOI's "one . . . unconstitutional mandate [that] was the cause of plaintiff['s] loss of equal protection" satisfies *Quinault's* requirement of general applicability of government action. *Berkley,* 45 Fed.Cl. at 232 (citations omitted). Coupled with lack of conflicts of interest, plaintiff's persistent pursuit of the case through administrative, congressional, and judicial channels demonstrates that he would adequately represent the class interests. Coincidentally, this record of persistence also establishes that assertion of individual claims is likely to be incredibly time-consuming and cost-prohibitive "for some, if not many." *Berkley,* 45 Fed.Cl. at 233.

Finally, the circumstances involving the application to intervene pursuant to RCFC 24 by Lt. Col. Billy Nix likewise support granting certification on Count IV. "Prior decisions have suggested that an expiring statute of limitations is a 'legitimate concern' when deciding whether or not to certify a class, and one which weighs in plaintiff's favor," *Berkley v. United States,* 45 Fed.Cl. at 234 (1999) (citing *Moore v. United States,* 41 Fed.Cl. at 400, and *Armitage v. United States,* 18 Cl.Ct. at 315), although this factor is not outcome-determinative if outweighed by the other factors, *see id.* In his *pro se* Motion, Lt. Col. Nix admitted filing past the statute of limitations, but claimed that the statute was tolled by commencement of plaintiff's class action under the rule of *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983).

Lt. Col. Nix requested intervention as of right to protect his interests in the event that the court declines to certify the class, or if the action is settled or voluntarily

dismissed. Alternatively, he requested permissive intervention because of commonality of factual and legal issues with the plaintiff's case. Like Lt. Col. Christian, Lt. Col. Nix is a white male officer retired by the 1992 LTC ACC SERB. However, Lt. Col. Nix served in the Aviation Corps, while plaintiff served in the Air Defense Artillery. Given these facts, Lt. Col. Nix would be would be included into the first, second, and third alternative definitions of the original class as well as the amended class. He would be excluded from the fourth alternative. Although Lt. Col. Nix's Motion mirrors plaintiff's claims and remedies sought, it does not make any claims related to plaintiff's Count III, the ABCMR review.

We held in *Barbieri v. United States,* 15 Cl.Ct. 747 (1988), that filing of a class action under Rule 23 of the Court of Federal Claims tolls the statute of limitations just as it does under the Federal Rule of Civil Procedure 23. Otherwise, the court reasoned, "potential class members . . . 'would be induced to file protective motions to intervene or to join in the event that the class was later found unsuitable' . . . [and] the utility of the class action device would be largely undermined." *Barbieri,* 15 Cl.Ct. at 751 (citing *American Pipe and Construction Co. v. Utah,* 414 U.S. 538, 553, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). Precisely such protective concerns were asserted by Lt. Col. Nix.

Related considerations inform the court's decision whether to certify a class at all. Were the certification refused here, many retired officers, a number of them *pro se,* would be forced to file intervention motions or initiate their own suits to avoid the statute of limitations. Because the operative events of this controversy took place approximately five years prior to the filing of the Complaint

in this case, the access of other similarly situated officers to the court would be significantly constrained. Timely suits, on the other hand, would likely burden the court through a backlog of similar cases and the likely need for extensive travel to accommodate all the plaintiffs. These problems will be avoided through the use of a class action device.

Weighing the applicable *Quinault* factors, the Court finds class certification of the amended class (with plaintiff's clarification for AGDB determinations as discussed above), to be appropriate. The court also finds a traditional opt-in procedure to determine the ultimate composition of the class to be appropriate in this case. *See, e.g. Berkley,* 45 Fed.Cl. at 235 (certifying an opt-in class). It makes good sense, then, for the court to DENY intervention and to TREAT this Motion to Intervene as an affirmative request to join the class.

Plaintiff's Amended Motion for Class Certification is GRANTED as to liability on Count IV and Lt. Col. Nix is INCLUDED in the plaintiff class.

VII. REMEDIES

Plaintiffs Christian and Nix seek reinstatement to active duty at the rank of Lieutenant Colonel with accrual of time-in-grade, time-in-service, and ordinary leave from the dates of their selection for retirement; pay, allowances, emoluments, and other pecuniary benefits from the date of their retirement to the day of reinstatement; correction of their military records to remove evidence of their retirements; consideration for schools and promotion opportunities lost due to the retirement; and, attorney's fees and costs, plus interest.

The court requires further proceedings on the question of remedies, especially in light of the class certification on liability. The parties are DIRECTED to submit within thirty (30) days a proposed date for a status conference on the issue.

CONCLUSION

For the foregoing reasons, the government's Motion to Dismiss and for Judgment upon the Administrative Record is GRANTED with respect to Counts I, II, and III, but DENIED with respect to Count IV. Plaintiff's Cross-Motion for Judgment on the Administrative Record is GRANTED with respect to Count IV, but DENIED as to Counts I, II, and III. Plaintiff's Motion for Class Certification is GRANTED as amended on liability with respect to Count IV, and DENIED with respect to Counts I, II, and III. Applicant's Motion to Intervene is DENIED, but Applicant-Intervenor is INCLUDED in the plaintiff class with respect to Count IV.

It is so ORDERED.

APPENDIX D

United States Court of Appeals for the Federal Circuit

ORDER

(Filed Oct. 3, 2003)

A petition for rehearing en banc having been filed by the APPELLEE, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 10, 2003.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: October 3, 2003

cc: Robert M. Loeb
John K. Larkins, Jr.
Barry Steinberg

CHRISTIAN V US, 02-5165
(CFC – 97-CV-165)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

APPENDIX E

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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10 U.S.C. § 613:

Oath of members of selection boards – Each member of a selection board shall swear that he will perform his duties as a member of the board without prejudice or partiality and having in view both the special fitness of officers and the efficiency of his armed force.

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10 U.S.C. § 633:

Retirement for years of service: regular lieutenant colonels and commanders – Except an officer of the Navy or Marine Corps who is an officer designated for limited duty to whom section 5596(e) or 6383 of this title applies and except as provided under section 637(b) of this title, each officer of the Regular Army, Regular Air Force, or Regular Marine Corps who holds the regular grade of lieutenant colonel, and each officer of the Regular Navy who holds

the regular grade of commander, who is not on a list of officers recommended for promotion to the regular grade of colonel or captain, respectively, shall, if not earlier retired, be retired on the first day of the month after the month in which he completes 28 years of active commissioned service.

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10 U.S.C. § 638(b)(1):

Selective early retirement.

* * *

(b)(1) An officer in a grade below brigadier general or rear admiral (lower half) who is recommended for early retirement under this section or section 638a of this title and whose early retirement is approved by the Secretary concerned shall – (A) be retired, under any provision of law under which he is eligible to retire, on the date requested by him and approved by the Secretary concerned, which date shall be not later than the first day of the seventh calendar month beginning after the month in which the Secretary concerned approves the report of the board which recommended the officer for early retirement; or (B) if the officer is not eligible for retirement under any provision of law, be retained on active duty until he is qualified for retirement under section 3911, 6323, or 8911 of this title, and then be retired under that section, unless he is sooner retired or discharged under some other provision of law.

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10 U.S.C. § 1558 (created by Pub. L. 107-107 § 503(a), enacted Dec. 28, 2001):

Review of actions of selection boards: correction of military records by special boards; judicial review

(a) CORRECTION OF MILITARY RECORDS – The Secretary of a military department may correct a person's military records in accordance with a recommendation made by a special board. Any such correction may be made effective as of the effective date of the action taken on a report of a previous selection board that resulted in the action corrected in the person's military records.

(b) DEFINITIONS – In this section:

(1) SPECIAL BOARD – (A) The term "special board" means a board that the Secretary of a military department convenes under any authority to consider whether to recommend a person for appointment, enlistment, reenlistment, assignment, promotion, retention, separation, retirement, or transfer to inactive status in a reserve component instead of referring the records of that person for consideration by a previously convened selection board which considered or should have considered that person.

(B) Such term includes a board for the correction of military records convened under section 1552 of this title, if designated as a special board by the Secretary concerned.

(C) Such term does not include a promotion special selection board convened under section 628 or 14502 of this title.

(2) SELECTION BOARD – (A) The term "selection board" means a selection board convened

under section 573(c), 580, 580a, 581, 611(b), 637, 638, 638a, 14101(b), 14701, 14704, or 14705 of this title, and any other board convened by the Secretary of a military department under any authority to recommend persons for appointment, enlistment, reenlistment, assignment, promotion, or retention in the armed forces or for separation, retirement, or transfer to inactive status in a reserve component for the purpose of reducing the number of persons serving in the armed forces.

(B) Such term does not include any of the following:

(i) A promotion board convened under section 573(a), 611(a), or 14101(a) of this title.

(ii) A special board.

(iii) A special selection board convened under section 628 of this title.

(iv) A board for the correction of military records convened under section 1552 of this title.

(3) INVOLUNTARILY BOARD-SEPARATED – The term "involuntarily board-separated" means separated or retired from an armed force, or transferred to the Retired Reserve or to inactive status in a reserve component, as a result of a recommendation of a selection board.

(c) RELIEF ASSOCIATED WITH CORRECTION OF CERTAIN ACTIONS – (1) The Secretary of the military department concerned shall ensure that an involuntarily board-separated person receives relief under paragraph (2) or under paragraph (3) if the person, as a result of a correction of the person's military records under subsection (a), becomes entitled to

retention on or restoration to active duty or to active status in a reserve component.

(2)(A) A person referred to in paragraph (1) shall, with that person's consent, be restored to the same status, rights, and entitlements (less appropriate offsets against back pay and allowances) in that person's armed force as the person would have had if the person had not been selected to be involuntarily board-separated as a result of an action the record of which is corrected under subsection (a). An action under this subparagraph is subject to subparagraph (B).

(B) Nothing in subparagraph (A) may be construed to permit a person to be on active duty or in an active status in a reserve component after the date on which the person would have been separated, retired, or transferred to the Retired Reserve or to inactive status in a reserve component if the person had not been selected to be involuntarily board-separated in an action of a selection board the record of which is corrected under subsection (a).

(3) If an involuntarily board-separated person referred to in paragraph (1) does not consent to a restoration of status, rights, and entitlements under paragraph (2), the Secretary concerned shall pay that person back pay and allowances (less appropriate offsets), and shall provide that person service credit, for the period –

(A) beginning on the date of the person's separation, retirement, or transfer to the Retired Reserve or to inactive status in a reserve component, as the case may be; and

(B) ending on the earlier of –

(i) the date on which the person would have been so restored under paragraph (2), as determined by the Secretary concerned; or

(ii) the date on which the person would otherwise have been separated, retired, or transferred to the Retired Reserve or to inactive status in a reserve component, as the case may be.

(d) FINALITY OF UNFAVORABLE ACTION – If a special board makes a recommendation not to correct the military records of a person regarding action taken in the case of that person on the basis of a previous report of a selection board, the action previously taken on that report shall be considered as final as of the date of the action taken on that report.

(e) REGULATIONS – (1) The Secretary of each military department shall prescribe regulations to carry out this section. Regulations under this subsection may not apply to subsection (f), other than to paragraph (4)(C) of that subsection.

(2) The Secretary may prescribe in the regulations under paragraph (1) the circumstances under which consideration by a special board may be provided for under this section, including the following:

(A) The circumstances under which consideration of a person's case by a special board is contingent upon application by or for that person.

(B) Any time limits applicable to the filing of an application for such consideration.

(3) Regulations prescribed by the Secretary of a military department under this subsection may not take effect until approved by the Secretary of Defense.

(f) JUDICIAL REVIEW – (1) A person seeking to challenge an action or recommendation of a selection board, or an action taken by the Secretary of the military department concerned on the report of a selection board, is not entitled to relief in any judicial proceeding unless the action or recommendation has first been considered by a special board under this section or the Secretary concerned has denied the convening of such a board for such consideration.

(2)(A) A court of the United States may review a determination by the Secretary of a military department not to convene a special board in the case of any person. In any such case, the court may set aside the Secretary's determination only if the court finds the determination to be –

(i) arbitrary or capricious;

(ii) not based on substantial evidence;

(iii) a result of material error of fact or material administrative error; or

(iv) otherwise contrary to law.

(B) If a court sets aside a determination by the Secretary of a military department not to convene a special board, it shall remand the case to the Secretary concerned, who shall provide for consideration by a special board.

(3) A court of the United States may review a recommendation of a special board or an action of the Secretary of the military department concerned on the report of a special board. In any such case, a court may set aside the action only if the court finds that the recommendation or action was –

(A) arbitrary or capricious;

(B) not based on substantial evidence;

(C) a result of material error of fact or material administrative error; or

(D) otherwise contrary to law.

(4)(A) If, six months after receiving a complete application for consideration by a special board in any case, the Secretary concerned has not convened a special board and has not denied consideration by a special board in that case, the Secretary shall be deemed for the purposes of this subsection to have denied consideration of the case by a special board.

(B) If, six months after the convening of a special board in any case, the Secretary concerned has not taken final action on the report of the special board, the Secretary shall be deemed for the purposes of this subsection to have denied relief in such case.

(C) Under regulations prescribed under subsection (e), the Secretary of a military department may waive the applicability of subparagraph (A) or (B) in a case if the Secretary determines that a longer period for consideration of the case is warranted. Such a waiver may be for an additional period of not more than six months. The Secretary concerned may not delegate authority to make a determination under this subparagraph.

(g) EXISTING JURISDICTION – Nothing in this section limits –

(1) the jurisdiction of any court of the United States under any provision of law to determine the validity

of any law, regulation, or policy relating to selection boards; or

(2) the authority of the Secretary of a military department to correct a military record under section 1552 of this title.

Pub. L. No. 107-107, § 503(c) (establishing effective date for 10 U.S.C. 1558):

Sec. 503. REVIEW OF ACTIONS OF SELECTION BOARDS.

* * *

(c) EFFECTIVE DATE – (1) Except as provided in paragraph (2), the amendments made by this section shall apply with respect to any proceeding pending on or after the date of the enactment of this Act without regard to whether a challenge to an action of a selection board of any of the Armed Forces being considered in the proceeding was initiated before, on, or after that date. (2) The amendments made by this section shall not apply with respect to any action commenced in a court of the United States before the date of the enactment of this Act.

Supreme Court, U.S.
FILED
MAR 5 - 2004
OFFICE OF THE CLERK

(3)

No. 03-938

In the Supreme Court of the United States

ROBERT F. CHRISTIAN, II, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a white male military officer cannot prevail on a claim of discrimination and receive full back pay and benefits, based on a claim that the instructions used by the military retention board impermissibly favored women and minorities, if the government can demonstrate that that military officer would not have been retained even absent the allegedly biased instructions.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 337 F.3d 1338. The opinion of the Court of Federal Claims (Pet. App. 24-44) is reported at 49 Fed. Cl. 720. An earlier opinion of the Court of Federal Claims (Pet. App. 45-101) is reported at 46 Fed. Cl. 793.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2003. A petition for rehearing was denied on October 3, 2003 (Pet. App. 102). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. By statute, the Army and the other military services are permitted to convene selection boards to recommend officers for early retirement. See 10 U.S.C. 611, 638; see also 10 U.S.C. 638a. In January 1992, the Secretary of the Army appointed the Fiscal Year 1992 Lieutenant Colonel Selective Early Retirement Board (Retirement Board or Board) to recommend Army lieutenant colonels for involuntary early retirement. Pet. App. 2. The Secretary issued lengthy detailed instructions to the Board, which was told to select for early retirement a "minimum" of 1210 officers and an "optimum" of 1452. *Ibid.* "[B]ased on the guidance" in the instructions, the Retirement Board was directed to "determine which officers to recommend for selective early retirement by first determining an order of merit list of the officers considered." *Ibid.* In addition, the instructions contained procedures designed to meet the Army's equal opportunity (EO) goals. *Id.* at 2-4.

In accordance with the Secretary's instructions, the Board used a four-phase procedure in selecting the candidates for early retirement, only two of which are relevant here. Pet. App. 4-5. During Phase I, the Board members reviewed and scored all of the candidates' records, establishing a comprehensive order of merit. *Id.* at 4. In performing that task, the Board members were instructed that there was a "goal" to "achieve a percent of minority and female officers recommended for early retirement not greater than the rate for all officers in the zone of consideration." *Id.* at 3. The members were also instructed that, when evaluating the records "of minority and female officers," they should "consider that past personal and institutional discrimination may have disadvantaged minority and

female officers." *Ibid.* The instructions explained that such "discrimination may include, but certainly is not limited to, disproportionately lower evaluation reports, assignments of lesser importance or responsibility, and lack of opportunity to attend career-building military schools." *Ibid.*

During Phase II, the Board selected the "optimum number" of officers for early retirement, and applied it to the list created during Phase I. Pet. App. 4. After the 1992 Board completed this phase, the retention rates for blacks, Hispanics, and Native American officers were lower than the anticipated retention rates. The applicable instructions required the Board to re-evaluate the records of minority and female officers if there were adverse deviations in the selection rates of these groups from the overall selection rates. *Ibid.* The instructions also mandated that the Board revote the ratings on the records of an officer if the Board members determined that the record evidenced past discrimination against the officer. *Id.* at 4-5.

At the end of this process, the Board recommended 1052 white male lieutenant colonels for early retirement, with 3067 retained; and 131 minority and female officers for early retirement, with 341 retained.[1] Pet. App. 4-5.

2. Plaintiff, Lieutenant Colonel Robert F. Christian, II, is a white male, who was selected for mandatory early retirement by the 1992 Board. He brought this class action in the Court of Federal Claims challenging the constitutionality of the EO instructions employed

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[1] There likely is some overlap and redundancy between the number of female officers and the number of minority officers listed above, because of, for example, double counting of minority females.

by the 1992 Board. Pet App. 5. The court certified the class, and on cross motions for summary judgment held that the instructions used by the 1992 Board impermissibly favored minorities. *Id.* at 5-6.

On July 10, 2001, the court issued a second opinion, addressing the issue of injury to the class members. C.A. App. 31. The court rejected the government's proposed "harmless error" analysis, under which the goernment proposed to establish a new selection board to determine which retired officers were harmed by the instructions, *i.e.*, who would have been retained had the instructions not been given. Pet. App. 6. The court ruled that, even though, at most, only 341 women and minorities were retained by the 1992 Board, the entire class of approximately 1030 non-minority male officers had been harmed by the unconstitutional procedures and were thus entitled to active duty back pay from the date they were improperly separated and other constructive service remedies until the date they are properly separated. *Ibid.*

After it issued its ruling on the issue of injury, the court certified the case for appeal under 28 U.S.C. 1292(d)(2). Pet. App. 7.

3. The Federal Circuit granted the government's petition for interlocutory review, and reversed the court's ruling on the issue of injury. Pet. App. 7-23.

The court of appeals held that the government had a right to demonstrate which class members were not harmed by the improper instructions. Citing, *inter alia*, *Texas* v. *Lesage*, 528 U.S. 18 (1999), and *Mt. Healthy City Bd. of Edu.* v. *Doyle*, 429 U.S. 274, 287 (1977), the court explained that the doctrine of "harmless error" was a well-established principle of federal law. Pet. App. 7-9. The court observed, "the Supreme Court has recognized that a harmless error analysis is

appropriate even for constitutional claims." *Id.* at 9. Moreover, the court recognized that the Federal Circuit "and its predecessor court have applied the harmless error analysis to military back pay cases." *Id.* at 10. The court explained, "[u]nder this authority, an officer cannot prevail in a challenge to a discharge after non-promotion if the government can demonstrate that, notwithstanding the error in the promotion proceedings, the officer still would not have been promoted." *Id.* at 10-11.

The court of appeals found that the "present case is a classic instance for applying harmless error." Pet. App. 11. While the instructions used by the Board may have provided minority and female officers preferential treatment, the "total number of minority and female officers retained was 341." *Ibid.* The court reasoned, "[e]ven if one were to assume that every one of those officers was retained solely because of an impermissible preference accorded minorities and females—a most unlikely assumption—at most that would mean that 341 white officers who were retired should have been retained." *Ibid.* Thus, "even under the most extreme assumption only about one-third of the white [male] officers" of the more than 1000 in the class could possibly have been retained. *Ibid.* Based on these facts, the court found, "the government has demonstrated with respect to at least two-thirds of the involuntarily retired male officers that it would have retired that number even without the impermissible instruction that favored minority and female officers." *Id.* at 12.

Applying the "general rules of damages" for military back pay claims to the present case, the court held that "the applicable principle is that the retired white officers are entitled to be placed in the same position they would have been in if the Retirement Board had not

considered the impermissible factors of race and gender in determining whom to recommend for involuntary early retirement, but not in a better position." Pet. App. 12. The court added, "[w]e know of no reason, convincing or otherwise—and the Court of Federal Claims has not provided any—why [the group of retired officers who would have been retired in any event under proper instructions] * * * should receive such a substantial financial windfall representing back pay they could not and would not have received even if the Retirement Board proceedings had been wholly free from the taint the Court of Federal Claims found in them." *Id.* at 13.

Finally, the court of appeals rejected the Court of Federal Claims' reliance on the constructive service doctrine as a basis for rejecting the harmless error claim in this case. Pet. App. 17-18. "Under that doctrine, military personnel who have been illegally or improperly separated from service are deemed to have continued in active service until their legal separation. They are, therefore, entitled to back pay and benefits for the intervening period, i.e., retroactive to their original separation from service." *Id.* at 17 (citation omitted). The court explained, "[n]othing in the constructive service doctrine is inconsistent with applying harmless error in this case." *Ibid.* That doctrine "was designed to permit the award of back pay to a service person who had been injured by the improper termination of his service, and thereby denied the financial and other benefits he should and would have received but for the improper termination." *Ibid.* The court reasoned, "[i]n the present case, the retired white officers who would have been retired even if the impermissible instruction had not been given to the Retirement Board cannot be properly viewed as having had their military

service improperly terminated, and they therefore have not been injured." *Id.* at 17-18. Thus, the court of appeals held that there is "no occasion to invoke the constructive service doctrine" in this case, since plaintiffs who would have been discharged in any event "have no claim, legal or equitable, to back pay for any period during which they did not perform military duty." *Id.* at 18.

In remanding the case to the Secretary, the court left open to the Secretary to decide what procedure would best determine which individuals would have been retained under proper instructions. Pet. App. 21-22. The court explained that "[o]nce the Secretary determines which members of the plaintiff class are entitled to reinstatement and back pay, the case will be returned to the Court of Federal Claims to consider any challenges to the Secretary's decision and to formulate an appropriate judgment." *Id.* at 22.

ARGUMENT

The court of appeals' decision is interlocutory, correct, and does not conflict with any decision of this Court or of any court of appeals. The court applied established precedent in concluding that not all members of a class that is nearly three times larger than the number of potential victims can recover for claims of unconstitutional discrimination. Moreover, any complaints raised by petitioners about how the remand proceedings may be conducted are premature. Finally, because of the enactment of new legislation, the petition does not present an issue of ongoing importance. Accordingly, review by this Court is not warranted, and the petition should be denied.

1. This Court's customary practice is to "await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); see, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). There is no reason for the Court to depart from—and strong reasons for the Court to follow—that practice in this case.

The court of appeals reversed the district court's holding that a class far larger than the universe of potential victims could recover for claims of unconstitutional discrimination and remanded the case to the Secretary of the Army, and then to the Court of Federal Claims, to identify the injured individuals and for further proceedings to determine the appropriate judgment for injured class members. Pet. App. 21a-22a. The Secretary's and the Court of Federal Claims' resolution of those issues could influence the Court's decision whether to grant review of the question presented in the petition, and the pendency of those issues counsels against piecemeal review of petitioners' claims at this time. See *Virginia Military Inst.*, 508 U.S. at 946 (Scalia, J., respecting the denial of certiorari) (noting appropriateness of denying interlocutory petition where court of appeals remanded "for determination of an appropriate remedy").

2. Even if petitioners' claims were not premature, review by this Court still would be unwarranted.

a. The court of appeals correctly held that petitioners' claims of discrimination in favor of women and minorities in the instructions applied by the 1992 Retirement Board are subject to a harmless error analysis. In *Texas* v. *Lesage*, 528 U.S. 18 (1999), this

Court held that a plaintiff cannot prevail on a discrimination claim by simply pointing to the fact that the government used discriminatory or other impermissible considerations. "[E]ven if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." *Id.* at 20-21. Thus, the Government must be granted the opportunity to "avoid liability by proving that it would have made the same decision without the impermissible motive." *Id.* at 21.

The court of appeals properly followed *Lesage* and held that the government must have the opportunity to demonstrate which of the class members would have been retired even under proper instructions.[2] Pet. App. 7-14. That application of established law does not warrant this Court's review. As the court of appeals recognized, this "case is a classic instance for applying harmless error." *Id.* at 11. Notably, petitioners do not contest the court of appeals' conclusion that at most 341 minorities and women were retained as a result of the 1992 EO instruction. Nor do they contest the court's finding that, even under an improbable worst case scenario, 341 white men at most could have been displaced by minorities and women as a result of the 1992 Board. The court of appeals properly held that, under *Lesage*, the government must be afforded an

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[2] Petitioners erroneously state that in this case "[l]iability was established" and was "uncontested on appeal." Pet. 9. As the court of appeals recognized, while respondent did not challenge in this interlocutory appeal the trial court's finding that the EO instruction was unlawful, it did contest the consequences of that finding in the Court of Federal Claims and throughout the Government's appeal.

opportunity to avoid liability by proving which of the white male officers were in fact displaced and which were not in fact harmed by the improper instructions.

b. The court of appeals' ruling is also consistent with longstanding precedent regarding military back pay claims. In such cases, the courts have long held that the government can avoid liability to a plaintiff if it can demonstrate that, notwithstanding the alleged error, the plaintiff suffered no tangible injury—*i.e.*, the plaintiff would not have been granted the promotion or avoided retirement in any event. *Hary* v. *United States*, 618 F.2d 704, 707 (Ct. Cl. 1980); Pet. App. 10-11. As the court of appeals explained, "an officer cannot prevail in a challenge to a discharge after non-promotion if the government can demonstrate that, notwithstanding the error in the promotion proceedings, the officer still would not have been promoted." Pet. App. 10-11; see *Porter* v. *United States*, 163 F.3d 1304, 1318 (Fed. Cir. 1998) ("[T]he quintessential military promotion question" is "whether it is unlikely that he * * * would have been promoted in any event.") (citation and internal quotation marks omitted), cert. denied, 528 U.S. 809 (1999).[3]

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[3] Consistent with Title VII's objective "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975), the harmless error approach is similarly applied in Title VII employment discrimination cases. See, *e.g.*, *United States* v. *City of Miami*, 195 F.3d 1292, 1299 (11th Cir. 1999), cert. denied, 531 U.S. 815 (2000); *Arnold* v. *United States Dep't of the Interior*, 213 F.3d 193, 198 (5th Cir. 2000) ("[T]he plain language of § 2000-e5(g)(2)(B)(ii) forbids an award of compensatory damages to a job applicant who, despite unlawful discrimination, still would not have received the job."), cert. denied, 531 U.S. 1144 (2001).

Refusal to apply a harmless error analysis in this context would not only be contrary to *Lesage* and the military pay cases, it would lead to a $100 million windfall to parties who were not in fact injured by the erroneous instruction. Pet. App. 13. "The harmless error doctrine is designed to prevent just such a result." *Ibid.*

Petitioners in the court of appeals admitted to the extreme nature of their position. They agreed that under their theory even if *one* female or minority was retained as a result of the 1992 Board instructions, then *all 1030* white men who were not retained would have the right to full back pay and benefits. As the court of appeals held, such a result is both plainly untenable and contrary to controlling precedent.

c. Contrary to petitioners' assertion (Pet. 14-18), there is no circuit conflict presented warranting this Court's review. Petitioners cite *Doyle* v. *United States*, 599 F.2d 984, as amended, 609 F.2d 990 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980), and *Dilley* v. *Alexander*, 603 F.2d 914 (D.C. Cir. 1979), as clarified, 627 F.2d 407 (D.C. Cir. 1980), as precluding the use of a harmless error analysis. In *Dilley* and *Doyle*, however, the promotion boards were unlawfully constituted because they did not contain the statutorily-required minimum number of reserve officers. Because the separations in those cases were conducted by a body without statutory authority, the courts concluded that it was as if the separations had never occurred.[4]

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[4] But see *Jones* v. *Alexander*, 609 F.2d 778 (5th Cir.), cert. denied, 449 U.S. 832 (1980), where the court rejected the argument accepted in *Doyle* and *Dilley* that improper composition of the Board rendered its acts a nullity. The Fifth Circuit, accordingly, approved of the use of "relook" boards to determine which officers were in fact prejudiced by the same improperly constituted boards

As the court of appeals explained (Pet. App. 13-19), *Doyle* and *Dilley* are not inconsistent with the court of appeals' holding in this case.[5] Rather, those cases provide a limited exception to the general rule that a service member or officer cannot prevail on a claim challenging a discharge after non-selection for promotion if the government can demonstrate that, notwithstanding the alleged error, he or she would not have been granted the promotion. The exception recognized in *Doyle* and *Dilley* was for cases where a promotion or selection board was illegally constituted and its actions deemed a nullity by the court. "Where the error goes * * * to the composition of the selection board * * *, the court has held the causal nexus (or, conversely, the 'harmless error') principle to be inapplicable." *Engels* v. *United States*, 678 F.2d 173, 175 n.6 (Ct. Cl. 1982). But otherwise the rule has long been that, to prevail in a military back pay case, the plaintiff must establish such a nexus. And even where the requisite error and nexus are established by a plaintiff, then "the end-burden of persuasion shifts to the [government] to show the 'harmlessness' of the error, that is, 'despite the plaintiff's prima facie case, there was no substantial nexus or connection.'" *Cunningham* v. *United States*, 39 Fed. Cl. 688, 693 (1998) (quoting *Engels*, 678 F.2d at 175); accord *Bockoven* v. *Marsh*, 727 F.2d 1558, 1563 (Fed. Cir.), cert. denied, 469 U.S. 880 (1984). "The

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at issue in *Dilley* and *Doyle*. In short, while there may be a conflict between *Doyle* and *Dilley* on the one hand and *Jones* on the other, that potential split is not implicated by this case, which involves properly constituted boards.

[5] As a court of claims opinion, *Doyle* at most could create an internal conflict within the Federal Circuit, 28 U.S.C. 1295, which would not justify review, see *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

ultimate determination of prejudicial error requires prediction about how an officer's record would appear to a promotion board in the absence of the errors, and a conclusion about whether the officer would have been promoted if his record was free of error." *Lindsay* v. *United States*, 295 F.3d 1252, 1261 (Fed. Cir. 2002).

Here, in contrast to *Doyle* and *Dilley*, there was no "fundamental error * * * affecting the composition of the deciding body." *Porter* v. *United States*, 163 F.3d at 1319. The 1992 Board had proper statutory authority and was properly composed. Thus, it was a lawful entity empowered to retire individual officers, and this case "is not a challenge to the legal authority of the final decisionmaker *qua* final decisionmaker." *Wolfe* v. *Marsh*, 835 F.2d 354, 359 (D.C. Cir. 1987), cert. denied, 488 U.S. 942 (1988). The error petitioners alleged pertained to the correctness of the Board's decision, not its legal authority to issue the decision. Accordingly, as in *Lesage*, the results of the 1992 Board were merely "voidable" as to those persons who were *in fact* injured by the instructions.

d. Petitioners also argue that the "constructive service doctrine" mandates granting full back pay to all of the white male lieutenant colonels retired by the 1992 Board, even if two-thirds of them would have been retired under proper instructions. As the court of appeals held, the "constructive service doctrine" does not require such absurd results. Pet. App. 17-18. That doctrine simply means that *if* a service member is improperly discharged, then he or she continues in his or her rank until properly discharged. *Ibid.* Thus, the right to continued pay is dependent on a showing by the individual officer that he or she has been subject to an improper discharge. What petitioners here ignore is that demonstrating an *injury caused* by an alleged

error is part of the prima facie case of showing that a person was wrongfully discharged. See *Lindsay*, 295 F.3d at 1259; *Hary*, 618 F.2d at 706.

e. Petitioners also err in asserting (Pet. 14-15) that the harmless error rule is inapplicable here because the 1992 EO instruction constituted "structural error." This Court rejected the same argument in *Lesage*. There, the lower court had held that a harmless error analysis could not be applied where the standards applied by the university were biased in favor of minorities. This Court expressly rejected that argument as contrary to "well-established" precedent. 528 U.S. at 20. The Court held that even if "in making a decision adverse to the plaintiff" the court used impermissible criteria that were biased in favor of minorities, *ibid.*, a harmless error analysis still can and should be used. The government still must be furnished the opportunity to "defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." *Id.* at 20-21.

f. Petitioners argue that a remand in this case to permit the government an opportunity to demonstrate which of the class members would have been retired under proper instructions cannot work and will not be fair to them. Those complaints are premature and do not present an issue warranting this Court's review.

As an initial matter, these concerns regarding the efficacy of the remand are premature. In remanding the case to the Secretary, the court of appeals recognized that petitioners would have an opportunity, after the remand, to challenge the Secretary's findings in the Court of Federal Claims. Pet. App. 21-22 ("[o]nce the Secretary determines which members of the plaintiff class are entitled to reinstatement and back pay, the case will be returned to the Court of Federal Claims to

consider any challenges to the Secretary's decision and to formulate an appropriate judgment").

Petitioners contend that a remand cannot work because the ranking lists created by the 1992 board no longer exists. Pet. 14. In so arguing, petitioners attempt to distinguish *Texas* v. *Lesage*, *supra*, on the ground that in that case there was contemporary existing evidence that would establish whether the plaintiff would have been accepted to the university program absent consideration of the impermissible criteria. But such contemporary evidence does exist in this case. Among other things, the service records of plaintiffs and the rest of the lieutenant colonels that were subject to the 1992 Board exist, and there is no impediment to examining those records as they existed in 1992 to determine whether it is more likely than not that individual plaintiffs were not injured by the 1992 EO instructions. See *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977); *Lesage*, 528 U.S. at 21. To the extent that petitioners have any complaint about the methodology employed by the Secretary on remand, they can raise such a challenge with the Court of Federal Claims thereafter. Pet. App. 22.

Petitioners also argue that there is no statutory authority to permit this remand. Pet. 21. They admit, however, that the court has authority to "remand appropriate matters to any administrative or executive body." 28 U.S.C. 1491(a)(2). Thus, there can be no question of the statutory authority.[6]

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[6] Even if there were no authority for a remand, the result would *not* be to preclude a showing of harmless error. Rather, the result would be that the Court of Federal Claims would be required to permit the government an opportunity to demonstrate to the court which class members would have been retired in any event. Here, where what is at issue is an agency decision, the

Moreover, petitioners ignore their concession below that a reconstituted Board could be used today to limit damages prospectively. C.A. App. 833. Thus, petitioners do not really dispute that a newly constituted Board can be used to review the records of the 1992 candidates for retention and can rank them to limit damages. The only real question is whether a harmless error analysis can be employed in this context or not. Under *Texas* v. *Lesage*, *supra*, the answer is clear: the court of appeals properly afforded the government the opportunity to demonstrate that the individual plaintiffs were in fact not injured by the 1992 EO instructions.

g. Finally, the court of appeals properly recognized that enactment of 10 U.S.C. 1558 by Congress in 2001

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court of appeals correctly held that "the proper course * * * is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). This is particularly true in the military context where Congress has entrusted military selection, retention, and promotion matters to the Service Secretaries who have established a system of selection boards to rank the candidates, and where the military possesses unique qualifications and expertise for which deference is appropriate. See *Orloff* v. *Willoughby*, 345 U.S. 83, 93 (1953) ("judges are not given the task of running the [military]"); *id.* at 94 ("The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters"); see also *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988) ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military * * * affairs"); *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (the Constitution vests "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force" exclusively in the legislative and executive branches).

has no bearing on the outcome of this case, that enactment does limit the future significance of the decision below. See National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, Div. A., Tit. V, § 503, 115 Stat. 1080 (to be codified at 10 U.S.C. 1558); Pet. App. 20. The new statute explicitly provides the remedy to be afforded in cases where a service member seeks to challenge an action or recommendation of a selection board. Under the new legislation, the Secretary may correct a service member's military records in accordance with a recommendation made by a special board. See § 503(a), 115 Stat. 1080 (to be codified at 10 U.S.C. 1558(a)). The judicial review portion of the statute provides that a person is not entitled to judicial relief unless the action or recommendation has first been considered by a special board or the Secretary has denied the convening of such a board for such consideration. See § 503(f)(1), 115 Stat. 1082 (to be codified at 10 U.S.C. 1558(f)(1)). Thus, the new statute provides a new mechanism for the Secretary to establish that a service member was not injured by a claimed error.

Contrary to petitioners' assertion, the fact that the statute applies prospectively does not in any way answer the question resolved by the court of appeals as to whether, *prior to* 2001, the government had the right to avoid liability to a service member by showing that the alleged non-promotion or retirement would have occurred even absent the alleged error in the instructions used by a retention or promotion board. Under *Lesage*, and the long line of military pay cases discussed above, the court of appeals correctly answered that question in the affirmative. In any event, given the enactment of the new statute, this legal issue will have little importance for future military cases similar to the

one at bar. Thus, the petition does not present an issue of ongoing importance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

ROBERT F. CHRISTIAN, II, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

1. Granting The Writ Is Appropriate, Notwithstanding The Interlocutory Appeal.

It is correct that a writ of certiorari "generally" is not granted to review an interlocutory decision. *E.g., VMI v. United States*, 508 U.S. 946 (1993). "But where . . . there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status. . . ." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 4.18 (8th Ed.). The ruling sought to be reviewed has sufficient finality and concreteness to permit its review, and is fundamental to the further conduct of this case.

2. The Army Cannot "Demonstrate" Harmless Error.

Respondent has framed a single "Question Presented" as whether the government can "demonstrate" that an officer would have been retired regardless of racial and gender bias by a military retirement board. This blurs the actual issues presented in this case. One issue here is whether the government is permitted to "demonstrate" harmless error where the nature of the proceeding shows the error was structural. Another issue, however, is whether the government is permitted to "demonstrate" harmless error through a non-judicial after-the-fact administrative process created by the Federal Circuit. Contrary to Respondent's suggestion, the language of *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999) that the government can defeat liability "by demonstrating that it would have made the same decision absent the forbidden

consideration" does not mean that the government is permitted to show harmless error under every circumstance, or that harmless error can be "demonstrated" by the results of a later ex parte, non-judicial determination by the offending defendant.

On the issue of whether the illegality in this case was a fundamental, structural error – and therefore not subject to a harmless error analysis in the first place – Respondent asserts that structural error exists only where a challenge is to the "legal authority to issue the decision." Resp. at 15. This position is inconsistent with precedent of this Court. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), for example, an erroneous charge to a lawfully constituted jury was found to be a structural error. Moreover, Respondent simply ignores 10 U.S.C. § 613 (Pet. App. 104), the organic law governing military retirement boards, which requires that boards be conducted without "prejudice or partiality." A military board that is instructed to act *with* "prejudice or partiality" is not "lawfully constituted."

The government's superficial reliance on the mantra that it must be permitted to "demonstrate" a same decision defense is exposed as fallacious by a single, uncontested fact: the government has conceded that it cannot prove its harmless error defense in court on existing evidence concerning the actions of the 1992 Retirement Board. It does not even argue that the results of the new proceeding endorsed by the Federal Circuit would be evidence of what occurred in 1992. Rather, under the Federal Circuit's opinion, the *Secretary of the Army* is to "determine[] which members of the plaintiff class are entitled to relief." *Christian v. United States*, 337 F.3d 1338 (Fed. Cir. 2003) (Pet. App. 22). The government's "demonstration" is simply the Army demonstrating to

itself for its own determination of which illegally retired officers, if any, are entitled to relief.

Truth be told, Respondent has piggy-backed off the structural nature of the error in this case (*i.e.*, the fact that it is impossible to determine the effect of the 1992 Retirement Board's racial and gender discrimination) to contend that it "must be furnished the opportunity," to "demonstrate" a same decision defense through a new administrative process, not to determine what the original board did (the board whose decision is in issue), but what the new process did.[1]

The Federal Circuit's opinion and the government's brief make clear that there exists a fundamental misunderstanding of the scope of the holding of *Texas v. LeSage*, and the writ should be granted to clarify these important issues of precedent and public concern.

3. There Will Be No "Windfall" To The Petitioners.

Respondent remarks that this case involves large potential damages, and seeks to characterize an award to the 882 class members as a "windfall." We respectfully disagree. Under the law, an officer has a right to the pay

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[1] Respondent states that we made a "concession" that a "reconstituted Board could be used today to limit damages prospectively." Resp. at 19. In fact, we merely acknowledged that the Army had the legal right to conduct a proper Selective Early Retirement Board at any time and legally retire officers, including those who had not been properly separated from service because of illegal actions by an earlier board. There was no concession that a Selective Early Retirement Board may lawfully retire officers retroactively, or that the results of a future board are "evidence" of what an earlier, illegal board actually did.

and other emoluments of his office until lawfully separated from service. Such a legal entitlement can never be a "windfall," and the fact that a large number of officers were illegally separated so as to make the damages large is immaterial.

Petitioners were separated from their right to serve as commissioned officers in a process that concededly violated both Constitutional and statutory prohibitions against racial bias. The Federal Circuit's creation of a right on the part of the offending agency itself to determine "harmless error" is not justified by the government's inability to prove in court *which* of these officers would have been retired if the 1992 Retirement Board had been conducted lawfully, even if it is assumed that *some* of them would have been retired. Indeed, the Federal Circuit's judicially-created "remedy" permitting the Army to retroactively determine which officers would have been retired over a decade earlier by an illegal retirement board fundamentally circumvents the entire involuntary retirement process established by Congress. Under the Federal Circuit's holding, the Army can violate the Constitutional (and statutory) protections against prejudice in the conduct of a retirement board, and then somehow "justify" the illegal retirements in a future, self-serving process that is entirely outside the retirement procedure established by Congress.[2]

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[2] In fact, as pointed out in our Petition, the Federal Circuit's procedure circumvents the express intent of Congress that such a procedure cannot be used in this case. Pub. L. No. 107-107, § 503(c) (Pet. App. 112).

CONCLUSION

For the foregoing reasons, and for those in the petition, petitioners respectfully request that this Court grant Writ of Certiorari and reverse the judgment of the Court of Appeals for the Federal Circuit.

Dated: March 11, 2004.

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